90-389 (1)

Supreme Court, U.S.
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CASE NO.:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

SAMUEL BRAEN, JR.
Petitioner

v.

NICHOLAS LAGANELLA and
P.T.&L CONSTRUCTION CO., INC.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a bankruptcy debtor can be collaterally estopped from litigating the question of whether he caused a "willful and malicious injury," as defined by 11 U.S.C. §523(a)(6), when the underlying debt emanated from a state court jury verdict based upon a preponderance of the evidence, rather than clear and convincing evidence. (The Court should note that certiorari was recently granted on April 30, 1990 in the case of *Grogan v. Garner*, No. 89-1149, ____ U.S. ____, 110 S. Ct. 1945, 109 L. Ed. 2d 308 (1990), which poses this identical question under 11 U.S.C. §523(a)(2)).

2. Whether a bankruptcy debtor can be collaterally estopped from litigating the question of whether he caused a "willful and malicious injury," as defined by 11 U.S.C. §523(a)(6), when the underlying judgment debt was fundamentally unfair, and proximately resulted from the malpractice of the debtor's state court trial counsel.

3. Whether a bankruptcy debtor can be collaterally estopped from litigating the question of whether he caused a "willful and malicious injury," as defined by 11 U.S.C. §523(a)(6), when the underlying debt emanated from ambiguous state court jury instructions which allowed the jury to find that the debtor acted maliciously merely by failing to act reasonably.

LIST OF ALL PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

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STATEMENT OF JURISDICTION

The judgment which is the subject of this petition was entered by the United States Court of Appeals for The Third Circuit on March 30, 1990. Petitioner's motion for rehearing and rehearing In Banc was denied on April 27, 1990. Accordingly, pursuant to 28 U.S.C. §2101(c) and United States Supreme Court Rule 13.4, the deadline for filing of this petition for a writ of certiorari is July 26, 1990.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1). This case involves an interpretation of 11 U.S.C. 523(a)(6) which provides that "(a) A discharge under Section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt *** (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]" The entire text of 11 U.S.C. §523 is in the Appendix at A105 *et seq.*

STATEMENT OF THE CASE

On November 30, 1983 the petitioner, Samuel Braen, Jr., (hereinafter "Braen, Jr."), was found liable to plaintiffs/respon-

dents Nicholas Laganella and P.T. & L. Construction Co., Inc. (hereinafter jointly referred to as "Laganella") for maliciously prosecuting the plaintiffs by providing information to New Jersey state investigators which led to the plaintiffs' indictment on charges of which they were later acquitted. The verdict against Braen, Jr., with interest, is approximately $14 million. Since the verdict and Braen, Jr.'s subsequent bankruptcy filing, Laganella has received cash, securities, and property worth approximately $1 million, which constitutes essentially all of Braen, Jr.'s estate.

This dispute began in October 1973, when Braen, Jr. agreed to cooperate with state authorities who were investigating wrongdoing in the public contracting business. Braen, Jr., who had himself been indicted a year earlier, and who was at the time expected to die as a result of two malfunctioning kidneys, gave information leading to the conviction and/or guilty pleas of several public officials and private citizens including three county freeholders, and several municipal officials of the town of Little Ferry, as well as the indictment of the New Jersey Secretary of State, who was acquitted on statute of limitations grounds. 388-389JA; 390-91JA; 394JA; 422JA; 434JA-36JA; 443JA; 445JA.[1] As a result of his cooperation, Braen, Jr. was highly commended by the New Jersey Attorney General's office and the New Jersey Department of Transportation.

During his initial interview with the New Jersey Attorney General's office, Braen, Jr. told about a bid he believed had been rigged between his father (Samuel Braen, Sr.) and Laganella. This interview was tape recorded in its entirety, and the transcript is

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[1] Citations are to the joint appendix previously submitted to the Court of Appeals for the Third Circuit which constitutes the record of the Court below.

contained in the Joint Appendix at 453JA-503JA. Only four pages of the transcript refer to Laganella. 479JA-483JA. Braen Jr.'s knowledge of this scheme was limited because he was not personally involved in the discussions in which Laganella purportedly agreed to pay Braen, Jr.'s father $180,000.00 to induce him to place a bid knowingly higher than Laganella's bid on the same public road building project.

As a result of this information, the New Jersey Attorney General's office conducted an independent investigation, interviewing numerous witnesses, which led it to determine that it had probable cause to take the bid rigging scheme to a grand jury. 441JA; 445JA-446JA; 451JA.

Braen, Jr. was only one of several persons called to testify before this grand jury. Other witnesses, including Laganella's own employee, James Mion, described the bid rigging scheme in substantial detail and identified physical evidence of the bribe, including relevant phone records, Laganella's payments, and promissory notes issued by Laganella outside the ordinary course of business to disguise payments to Braen, Sr., all of which corroborated Braen, Jr.'s investigatory lead. Laganella refused to testify on Fifth Amendment grounds, and the grand jury indicted Laganella in or about mid 1974.

These limited acts of Braen, Jr. constitute the entirety of Braen, Jr.'s supposed malicious prosecution of Laganella. After Laganella's indictment, Braen, Jr. no longer participated in the prosecution. Instead, the State took Laganella to trial based exclusively on the testimony of other persons with personal knowledge of Laganella's wrongdoing. Kathy Flicker, Esq., the

State Attorney General responsible for the prosecution of Laganella, stated by affidavit that Braen, Jr. was not called to testify for two reasons.[2] First, Braen, Jr. had less knowledge than others personally involved. Indeed Braen, Jr.'s knowledge was essentially hearsay and inadmissible at trial as contrasted to a grand jury proceeding. *See* Flicker affidavit at A67 and at 361JA, paragraph 11. Second, Braen, Jr.'s health had, at the time, so seriously deteriorated that he was unable to testify. Flicker said at the time of Laganella's trial, in response to a question directed to her by the trial judge:

> THE COURT: * * * What about his physical condition, what was it about his physical condition that prevented you from calling him here?
>
> [DEPUTY ATTORNEY GENERAL] His physical condition is such that the man cannot testify for 40 minutes. He can't talk to someone for 40 minutes and keep his train of thought. I have interviewed this man day in and day out and he will sit there, and after 20 minutes, he is completely in space, and I represent that to the Court. I've spent enough time with the man that I don't feel that I could put him on the stand and subject him to cross-examination.

State v. Laganella, 144 N.J. Super. 268, 275, 365 A. 2d 224 (App. Div. 1976).

At Laganella's trial, which commenced in April 1975, a

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[2] Both Kathy Flicker, Esq. and Michael Bozza, Esq., the two New Jersey Attorneys General who were most responsible for prosecuting Laganella submitted affidavits in Braen, Jr.'s favor in the bankruptcy matter. These affidavits, which are contained in the Joint Appendix at 354JA-364, have also been appended hereto at A64 through A77, pursuant to Rule 14.1(k)(v). Both Flicker and Bozza state that they would have been willing to testify, (cont. p.5)

"chain of events, almost bizarre in nature", occurred, as described by the New Jersey Superior Court, Appellate Division. *State v. Laganella*, 144 N.J. Super. at 274, 365 A. 2d at 22. At the close of the State's case Laganella's attorneys made two motions for a directed verdict, the first of which was to dismiss on the grounds that the State had failed to make out a prima facie case. This motion, according to the Appellate Division, was "correctly denied" because the State had proved, without any testimony from Braen, Jr., the existence of probable cause to establish that Laganella and P.T. & L. had rigged the bid. 144 N.J. Super. at 290, 365 A 2d. at 236.

Laganella next moved for a directed verdict on alternate grounds asserting that he had somehow been prejudiced because Braen, Jr. had *not* been called as a witness. Against the weight of law, this motion was granted by the Court, and the indictment against Laganella and P.T. & L. was dismissed. Such dismissal was immediately appealed by the State. On August 18, 1976 the New Jersey Appellate Division reversed the dismissal and Laganella was remanded for a second trial. 144 N.J. Super. 268, 365 A. 2d 224. Contained in its determination that a reversal was appropriate, was a finding by the Appellate Division that there was strong evidence of Laganella's and P.T. & L.'s guilt, without any testimony from

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(cont.) if asked, that it was they, not Braen, Jr., who chose to prosecute Laganella, a fact that if submitted to the court would have completely foreclosed Laganella's civil action for damages. As detailed, *infra*, however, Braen, Jr.'s civil trial attorneys never spoke with Flicker, and did not speak with Bozza until the morning he was called to testify. Nor did they ever obtain the State's file with its substantial evidence of Laganella's guilt, thus causing the adverse judgment at issue here. Importantly this exculpatory evidence was never considered by the New Jersey courts on appeal because it did not meet the standards of the New Jersey equivalent of Rule 60(b) because it was not, technically, new evidence.

Braen, Jr. 144 N.J. Super. at 274 n.l., 365 A. 2d at 227 n. l.

During the time period between the dismissal of the indictment, and the above referenced opinion of the New Jersey Appellate Division, Laganella applied for the right to again bid on State projects, a privilege from which he had been barred following his indictment. Former New Jersey Superior Court Assignment Judge Leon A. Gerofsky heard testimony on Laganella's request. Once again Braen, Jr. did not participate. After hearing the testimony of other witnesses, however, including Laganella himself, Judge Gerofsky concluded that Laganella was lying and found such "lack of moral integrity" on the part of P.T. & L. and Laganella as made them unfit to bid on State jobs.[3] A97 and 522JA-523JA. This conclusion was noteworthy because it expressly rejected the very same story Laganella told at the later malicious prosecution trial against Braen, Jr., i.e., that he had paid Braen's father to settle a potential dispute over the use of Braen, Sr.'s bridge contractor. Gerofsky's report was issued on November 10, 1975. Gerofsky's findings were independently reviewed by Alan Sagner, then the New Jersey Commissioner of Transportation who, after reading all of the testimony, also concluded that there was probable cause to believe that Laganella lacked the moral integrity to bid on public jobs:

> [M]y experience as Commissioner of the New

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[3] The entire opinion of Gerofsky, which clearly establishes that Laganella was guilty of the acts reported by Braen, is attached at A78 through A97. As explained in detail, *infra*, this report would have been dispostive evidence in Braen, Jr.'s malicious prosecution trial that Braen had probable cause to inform the Attorney General of this report of Laganella's activities but was never procured by his attorneys in an act of gross malpractice.

> Jersey Department of Transportation and my common sense as a businessman cause me to disbelieve the version of the questioned bidding propounded by Nicholas Laganella. I find particularly incredible the explanation of the settlement of a potential damage claim [and there is] more than adequate evidence to create a reasonable suspicion that the misdeeds for which P.T. & L. and Laganella were indicted did occur[.]

525JA-526 JA.

Thus, by mid-1976, at least six different entities, specifically the New Jersey Attorney General's office, a State Grand Jury, the New Jersey Superior Court Law Division, the Honorable Leon Gerofsky, the Commissioner of the New Jersey Department of Transportation, and three judges of the New Jersey Appellate Division, had all determined that there was probable cause to believe that Laganella had rigged the bid.

In the meantime, Braen, Jr.'s health continued to deteriorate until he received a kidney transplant in 1984. Long before this transplant, while Braen, Jr.'s health problems continued, Laganella was eventually retried, again without Braen's testimony. Laganella and P.T. & L. were acquitted at the conclusion of his second trial in December of 1978, and on February 25, 1980 filed suit against Braen, Jr. Braen, Sr., an employee of Braen, Sr. named Harry Evans, and a non-existent entity described by plaintiff as "Braen Industries, Inc. "[4] Laganella's suit alleged that these defendants maliciously prosecuted him by providing information to the Attorney

[4] Laganella also twice filed malicious prosecution suits against Kathy Flicker, Esq., John Sheehy, Esq. (the attorney general who handled Laganella's second trial) and Richard Rudin, Esq. who handled Laganella's bidding debarment. These suits were all dismissed on summary judgment. 362JA

General's office which resulted in Laganella and P.T. & L.'s indictment. The matter was tried in November of 1983, and resulted in the debt that is the subject of this petition.

The civil trial, it can fairly be said, was a miscarriage of justice, resulting from Braen, Jr.'s attorney's malpractice. As set forth in the report of former United States Attorney and United States District Court Judge, Frederick B. Lacey, Esq., Braen Jr.'s trial court attorneys failed to exercise their reasonable duty to their client to obtain, assemble and utilize relevant available information, which would have exonerated Braen, Jr. *See* Report, 365-38OJA. Notably, Laganella has never produced a rebuttal expert report, nor has he even contested this claim of malpractice on the record, except to argue generally that Braen, Jr. was not denied due process in the malicious prosecution trial. Moreover, Laganella has even gone so far as to claim he is entitled to proceeds from Braen, Jr.'s currently pending malpractice suit against his former attorneys.

The actions of Braen's attorneys ("Amster & Rosensweig") were inexcusable. Essentially, they devoted virtually no effort to the case prior to trial. No interrogatories were served, and there was no indication that Amster or Rosensweig made any effort to interview prior to trial any of the prosecutors with personal knowledge of the case, particularly Kathy Flicker, Esq., and Michael Bozza, Esq., who, as noted earlier, were both willing to testify that it was they, rather than Braen, Jr., who initiated the prosecution of Laganella.

Braen, Jr.'s attorneys also made no effort to obtain the State's file in the matter which contained a plethora of important

documents, including the Gerofsky findings, miscellaneous internal memoranda, copies of Laganella's, Braen's, Evan's and others' grand jury testimony, and physical evidence of the rigged bid. As a result of this failure, Amster and Rosensweig were unable to successfully move to dismiss or to impeach Laganella at trial.

Amster and Rosensweig also committed several serious errors in connection with the trial itself. Most particularly, Amster and Rosensweig allowed the case to go to the jury under the wrong law. In New Jersey, as reaffirmed by a letter opinion recently authored by the Honorable Anne E. Thompson, U.S.D.J., one who "merely responds to requests for information or who testifies as a witness does not by those acts, institute or continue a prosecution." *Jackson v. Hanover Insurance Companies.* No. 88-1379, *slip op.* at p.2 (D.N.J. May 16, 1988) (attached at A101.) The Court continued that if the defendant "merely states what he believes leaving the decision to prosecute entirely to the uncontrolled discretion of the officer, he cannot be found liable for instituting or continuing the prosecution." Id. at 2-3; A101.

Such law was directly applicable to the facts of this case, where Braen merely provided information to the Attorney General's office in response to its inquiries. Amster and Rosensweig never became aware of this rule of law, however, and thus failed to request appropriate instructions. There was no excuse for this failure since this rule of law had been clearly expressed four years before the malicious prosecution trial in the reported decision of *Whittaker v. Duke*, 473 F.Supp. 908, 910 (S.D.N.Y. 1979) (interpreting New Jersey law). *See also, Brien v. Lomazow*, 227 N.J. Super. 288, 547 A.2d 318 (App. Div. 1988).

Second, by failing to interview and call Kathy Flicker, Esq., the original trial counsel for the State, and by failing to interview Michael Bozza before the day of trial, Amster and Rosensweig failed to adduce substantial, helpful testimony to Braen Jr.'s case, particularly the facts that would have established Braen, Jr.'s nonculpability under the legal standard identified above. As noted earlier, both Bozza and Flicker signed affidavits in connection with this Bankruptcy action, which the District Court found highly relevant. 94 B.R. at 42 n.4. These affidavits (Bozza at A72 and 354-358JA; Flicker at A64 and 359-364JA) conclusively establish that the information provided by Braen, Jr. was mostly hearsay and that the matter would not have been prosecuted by the State unless such hearsay information was independently corroborated. Flicker, as outlined in her affidavit, would have testified that the decision to prosecute in this matter was hers, and not the informant's. A70, 360JA. Flicker would have further established that Braen, Jr.'s information was essentially a lead, rather than the impetus for the prosecution. *Id.* Had Flicker testified, and had she been believed, there would have been no malicious prosecution since Braen, Jr. did not initiate the prosecution.

Several other serious errors were also committed at trial. No effort was made, for example, to explain to the jury the extent to which Braen, Jr.'s health was impaired. At the time of the trial, Braen, Jr. had been on dialysis for twelve or more years. He was very ill, and the illness affected his appearance, his memory, and obviously had a substantial effect on his ability to testify. The extent to which Braen, Jr. was mentally incapacitated by his illness was graphically explained by Kathy Flicker eight years earlier as previously quoted in this petition. During the interim, of course,

Braen, Jr.'s condition only continued to deteriorate. Despite Braen, Jr.'s inability to communicate or even aid in his own defense, however, Braen, Jr.'s attorneys never asked that his illness be explained to the jury. Instead, his attorneys called him to the stand for direct testimony where he made an atrocious witness for reasons completely unrelated to the truthfulness of his testimony.

In addition, no damage defense was offered at all by Amster and Rosensweig. Laganella's accountant was able to testify, without contradiction, that Laganella's damages amounted to more than 10 million dollars. No counter expert was offered, and there is no indication that Laganella's books were even examined. This error was further compounded by Amster and Rosensweig's failure to obtain the Gerofsky hearing report. It is highly noteworthy that P.T. & L. was placed on the debarred bidders list on September 27, 1974. P.T. & L. was, however, allowed to finish 4 or 5 projects it was working on when it was first suspended. In the fall of 1975, less than a year after the suspension was ordered, Laganella and P.T. & L. applied for reinstatement, and were rejected by hearing examiner Gerofsky, and eventually suspended for a full five years.

The damages which Laganella was awarded by the jury were based upon the assumption that Braen, Jr.'s information had caused Laganella and P.T. & L. to lose 5 years worth of business. Had Amster and Rosensweig merely obtained the Gerofsky hearing report prior to trial, however, they would have easily been able to establish an independent intervening factor that would have limited Laganella and P.T. & L. to any damages incurred prior to November 10, 1975, a small fraction of the amount actually awarded.

Finally, Amster and Rosensweig also failed to object to jury charges that allowed the jury to find Braen, Jr. liable for maliciously prosecuting even if it was determined that his conduct amounted to no more than negligent or reckless behavior.

Specifically, the Court charged the jury as follows:

> ...if you find that the defendant did not have an honest belief that the plaintiff was guilty, and that the charges were thereby falsely brought, you must conclude that there was no reasonable or probable cause. The plaintiff must establish that the defendant was activated by malicious motive in prosecuting the criminal or moving the criminal proceedings, giving that information which brought about the criminal proceedings against the plaintiff. Not malice in the sense that the word is sometimes used, the kind of malice I speak of means the [sic] intention or doing of a wrongful or unlawful act without cause or excuse. Such malice is an intentional act which an ordinary cautious man would realize that under the circumstances damage would result to one's person or one's property. ***The element may be inferred from a lack of reasonable or probable cause.*** 233 JA-234JA. (emphasis added).
>
> * * *
>
> I think it may be proper if I again define for you the term malice. Malice is, in this connection, means the [sic] intention commission of a wrongful act without just cause or excuse, but malice in the law means nothing more than an intentional doing of a wrongful act without justification or excuse. What is a wrongful act? The meaning of that definition, any act which in the ordinary course would infringe upon the rights of another to his

> damage is wrongful, except if it be done in the exercise of an equal or superior way. *Malice must be inferred from a lack of probable cause*. 236 JA (emphasis added.)[5]

The Court also defined probable cause, stating that "reasonable or probable cause is defined as a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinarily prudent man in believing that the party is guilty of the offense. It must be more than an unfounded suspicion." 231 JA. The Court continued, stating, "However, I will repeat conjecture, unfounded suspicions do not constitute reasonable or probable cause." 232 JA. Thus, by merely following the jury instructions, the jury could well have found that Braen, Jr. and his co-defendants committed malicious prosecution by providing the attorney general with an unfounded suspicion that proved erroneous.

The civil trial lasted approximately two weeks and resulted in a verdict against all defendants in the amount of $10,175,000.00 plus punitive damages. The verdict was based upon a preponderance of the evidence. Following the verdict, judgment N.O.V. was granted to the corporate defendant and denied to the individuals who appealed.

At about the time defendants filed their notices of appeal, the newly substituted attorneys had their first opportunity to review the State's file in the matter. As a result of this review, defendants' attorneys filed a motion to expand the record to include the State's files. This motion was denied on August 22,

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[5] Subsequently, the court stenographer submitted a certification stating that she had incorrectly transcribed the word "may" as "must" in the last sentence of this paragraph.

1984 on the grounds that this was not technically new evidence, which meant that no New Jersey reviewing court has ever considered the merits of this exculpatory evidence. On October 9, 1985, the Appellate Division issued an opinion reversing the judgment against Samuel Braen, Sr., and affirming the judgments against Braen, Jr. and Harry Evans.[6]

On or about October 31, 1985 Braen, Jr. petitioned the New Jersey Supreme Court for certification, and on September 8, 1986, the Supreme Court denied Braen's petition without comment. On October 8, 1986, Braen, Jr. filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code.

On December 4, 1986, Laganella and P.T. & L. filed the complaint that is the subject of this motion to have the debt at issue declared non-dischargeable. The United States Bankruptcy Court for the District of New Jersey granted summary judgment to Laganella, finding the debt nondischargeable by applying the doctrine of collateral estoppel. *In re Braen*, 87 B.R. 841 (Bankr. D. N.J. 1988). The District Court, in turn, reversed on three grounds, finding that collateral estoppel was inappropriate because (a) the state court verdict was based upon a preponderance of evidence while the clear and convincing evidence standard applied in the Bankruptcy Court; (b) the jury charge allowed the jury to find Braen liable for acting negligently, and thus precluded a finding of willful and intentional malice as required under federal bankruptcy law; and (c) the Bankruptcy Court failed to consider the underlying

[6] Following the Appellate Division's decision, Braen, Sr.'s estate brought suit against Amster and Rosensweig for their malpractice in connection with this trial. That suit was settled by Amster and Rosengweig for $40,000.00, which represents a substantial amount of money in light of the fact that Braen, Sr.'s sole out-of-pocket expenses were his attorney fees.

fairness of the state court verdict, particularly the malpractice of Braen's former counsel and Braen, Jr.'s health problems. *In re Braen*, 94 B.R. 35, Bankr. L. Rep., ¶ 72558 (D.N.J. 1988).

On March 30, 1990, the Court of Appeals for the Third Circuit reversed, and on April 27, 1990, Braen, Jr.'s petition for rehearing was denied. *In re Braen*, 900 F.2d 621, Bankr. L. Rep. ¶73297 (3rd Cir. 1990).

BASIS OF FEDERAL JURISDICTION

Jurisdiction in the Court of Appeals was based upon 28 U.S.C. §1292(b). General subject matter jurisdiction for this entire controversy is based upon 11 U.S.C. §101 *et seq.* and 28 U.S.C. §1334.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF A WRIT OF CERTIORARI

ISSUE NO. 1:

SUBSTANTIAL DISPUTE EXISTS AMONG THE CIRCUIT COURTS OF APPEAL AS TO WHETHER THE DOCTRINE OF COLLATERAL ESTOPPEL APPLIES TO 11 U.S.C. §523 WHERE A PREVIOUS JUDGEMENT IS BASED UPON A "PREPONDERANCE" OF THE EVIDENCE RATHER THAN A "CLEAR AND CONVINCING" EVIDENCE STANDARD.

At the outset it should be noted that a virtually identical issue to that presented herein is already the subject of a writ of certiorari which has been granted by this Court to the United States Court of Appeals for the Eighth Circuit in the matter of *Grogan v. Garner*, No. 89-1149, ___U.S. ___, 110 S.Ct. 1945,

109 L. Ed. 2d 308 (1990).

Moreover, almost simultaneously with the granting of certiorari in the *Garner* matter, two additional United States Courts of Appeal, specifically the Court of Appeals for the Third Circuit in this dispute, and the United States Court of Appeals for the Fifth Circuit in the matter of *In Re Foreman*, ____ F.2d ____, 1990 W.L. 89467 (5th Cir. July 2, 1990), have each issued opinions on the standard of proof required in a dischargeability hearing, with opposing results.

Currently there is substantial disagreement among the Circuits as to what standard of proof is required to establish that a debtor is not entitled to a discharge under §523(a). Indeed, there is even apparent disagreement as to whether one single standard of proof applies. To date, the following Circuit Courts of Appeal and Bankruptcy Appeal Panels have reached the following conclusions in the following cases:

In Re Braen, 900 F.2d 621, Bankr. L. Rep. ¶73297 (3rd Cir. 1990) (preponderance standard applies to §523(a)(6));

Combs v. Richardson, 838 F.2d 112 (4th Cir. 1988) (preponderance standard applies to §523(a)(6));

In Re Foreman, ____F.2d ____, 1990 W.L. 89467 (5th Cir. July 2, 1990) (clear and convincing standard applies to 523(a)(2));

In Re Martin, 761 F.2d 1163 (6th Cir. 1985) (clear and convincing standard applies to §523(a)(2);

In Re Kimzey, 761 F.2d 421 (7th Cir. 1985) (clear and convincing standard applies to §523(a)(2));

In Re Garner, 881 F.2d 579, 581 (8th Cir. 1989), *cert granted sub nom Grogan v. Garner*, No. 89-1149, ____U.S. ____, 110S. Ct. 1945, 109 L. Ed. 2d 308 (1990) (clear and convincing standard applies to §523(a)(2), and perhaps to all actions under §523(a));

In Re Dougherty, 84 B.R. 653, 656, 18 Collier Bankr. Cas. 2d 471, 17 Bankr. Ct. Dec. 590, Bankr. L. Rep. ¶ 72200, 25 Fed. R. Evid. Serv. 686 (9th Cir. B.A.P. 1988) (clear and convincing standard applies to §523(a)(2) and perhaps to all actions under §523(a));

In Re Black, 787 F.2d 503 (10th Cir. 1986) (clear and convincing standard applies to §523(a)(2));

Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257 (11th Cir. 1988) (clear and convincing standard applies to §523(a)(6)).

While the instant matter presents issues virtually identical to those in the *Garner* case currently before this Court, it also raises a subtle but important issue not necessarily implicated in *Garner*. Specifically, in *Garner* the Court is faced with the narrow issue of the appropriate standard of proof under 11 U.S.C. §523(a)(2) alone. The current petition raises a similar question of the appropriate standard under Section 523(a)(6). By considering the issues raised in the instant petition, the Court can approach this issue from a broader perspective, addressing the question as to whether there should be a single federal standard of proof for all exemptions under Section 523(a) or whether the standard should vary with the type of exemption. This issue is squarely presented by this petition and the decision of the United States Court of Appeals for the Third Circuit below, which went to great length to confine its ruling to the proof necessary to establish a willful and malicious

injury under §523(a)(6) alone. Now would appear to be an excellent time for this Court to address the entire question of requisite proof in bankruptcy dischargeability cases, rather than leaving a portion of this issue still open for speculation and confusion.

Thus, under the totality of the circumstances, and in light of the substantial conflict between the various Circuit Courts of Appeal on the requisite standard(s) of proof in dischargeability hearings, the petitioner respectfully suggests that the granting of a writ of certiorari would be appropriate at this time. This is particularly so in light of the "fresh start" philosophy of the federal Bankruptcy Code, discussed at length *infra*, as well as the important distinctions between standards of proof as only recently observed by this Court in *Price Waterhouse v. Hopkins*, ____ U.S.____, 109 S. Ct. 1775, 104 L. Ed 2d 268 (1989) and cases cited therein.

ISSUE NO. 2

THE COURT OF APPEALS' REFUSAL TO ALLOW THE DEBTOR A HEARING AS TO THE DISCHARGEABILITY OF HIS DEBT RESULTING FROM HIS ATTORNEYS' MALPRACTICE IS IN DIRECT CONFLICT WITH THE SPIRIT OF THE BANKRUPTCY CODE AS WELL AS APPLICABLE DECISIONS OF THIS COURT WHICH REFUSE TO APPLY THE COLLATERAL ESTOPPEL DOCTRINE WHERE SUCH APPLICATION WOULD BE FUNDAMENTALLY UNFAIR

Whether malpractice by a debtor's attorney constitutes a bar to the invocation of the collateral estoppel doctrine in a

bankruptcy dischargeability hearing is an issue which has never been directly addressed by this Court. This Court has, however, repeatedly held that the doctrine of collateral estoppel is an equitable doctrine grounded upon concepts of fundamental fairness to a litigant. *Blonder-Tongue Lab. Inc. v. University of Ill. Fndn.*, 402 U.S. 313, 328-29, 91 S. Ct. 1434, 1442-43, 28 L. Ed 2d 778 (1971); *Kremer v. Chemical Const. Co.*, 456 U.S. 461, 480-81, 102 S. Ct. 1883, 1897, 72 L. Ed. 2d 262 (1982). This Court has also repeatedly recognized and reaffirmed the philosophy of the Federal Bankruptcy Code, which was adopted by Congress for the purpose of providing individuals, who through no fault of their own are unable to meet their financial obligations, a fresh opportunity to move on with their lives after the discharge of any debts they have incurred.

Both of these well-recognized doctrines coalesce in a case such as the one presented by this petition and should prevent the utilization of the doctrine of collateral estoppel to deny a discharge to an individual whose debt proximately resulted not through any fault of his own, but rather as a result of the malpractice of his attorneys. The question presented, therefore, would appear to be an appropriate one for adjudication by this Court on two separate grounds, i.e., an important question of interpretation of federal law which has not been, but should be, settled by this Court (Rule 10.1(c)), as well as a case in which a Court of Appeals has decided a federal question in a manner that conflicts with previous analogous decisions of this Court. *Id.*

This Court's seminal decision on the subject of preclusionary doctrines in the Bankruptcy Court is *Brown v. Felsen*

442 U.S. 127, 127-28, 99 S. Ct. 2205, 2207, 60 L. Ed. 2d 767 (1979), wherein the Court determined that the doctrine of res judicata does not prohibit a Bankruptcy Court from considering "evidence extrinsic to the judgment and record of a prior state suit when determining whether a debt previously reduced to judgment is dischargeable." In this decision, the Court expressly recognized the salutory results that are achieved through the utilization of a preclusionary doctrine such as res judicata, pointing out that the doctrine "encourages reliance on judicial decision, bars vexatious litigation, and frees the court to resolve other disputes." 442 U.S. at 131, 99 S. Ct. at 2209. Such observations apply with equal weight to the preclusionary doctrine of collateral estoppel.

Despite these important benefits, the Court concluded that "neither the interests served by res judicata, the process of orderly adjudication in state courts, nor the policies of the Bankruptcy Act would be well served by forestalling [the] petitioner from submitting additional evidence to prove his case." 442 U.S. at 132, 99 S. Ct. at 2210. As the Court concluded, "Refusing to apply res judicata here would permit the Bankruptcy Court to make an accurate determination whether the respondent in fact committed the deceit, fraud and malicious conversion which petitioner alleges." 442 U.S. at 138, 99 S. Ct. at 2212. In footnote 10 to the *Brown v. Felsen* decision, the Court noted that while it was rejecting the principal of res judicata under these circumstances, it was not rejecting the principle of collateral estoppel which would bar relitigation in the Bankruptcy Court of such factual issues as were actually and necessarily decided in a prior suit. 442 U.S. at 139 n.10, 99 S. Ct. at 2213 n.10.

This Court has already held, however, on several occasions, that the mere fact that an issue has been decided by a previous court does not automatically deprive an interested party from contesting the decided issue in a subsequent proceeding, under certain limited circumstances. In addressing the use of offensive collateral estoppel, for example, this Court found that where the doctrine "would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331, 99 S. Ct. 645, 652, 58 L. Ed. 2d 552 (1979).

Even in cases dealing with the narrower issue of defensive collateral estoppel this Court has repeatedly "previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 480-81, 102 S. Ct. 1883, 1897, 72 L. Ed. 2d 262 (1982) (citations omitted). As the Court found in *Montana v. United States*, 440 U.S. 147, 164 n. 11, 99 S. Ct. 970, 979 n. 11, 59 L. Ed. 2d 210 n. 11 (1979), "a redetermination of issues is warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation."

All the cases identified above require that a court, which is being asked to apply the doctrine of collateral estoppel, make an inquiry into the fairness of the underlying judgment. The procedure to be employed was most thoroughly examined by this Court in *Blonder-Tongue Lab. Inc. v. University of Illinois Fndn.*, 402 U.S. 313, 328-334, 91 S. Ct. 1434, 1442-45, 28 L. Ed. 2d 788 (1971).

In the *Blonder-Tongue* decision, the Court found that a party involved in a patent dispute, "must be permitted to demonstrate, if he can, that he did not have 'a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time.' ", citing *Eisel v. Columbia Packing Co.*, 181 F. Supp. 298, 301 (D. Mass. 1960). The Court found that "this element in the estoppel decision will comprehend, we believe, the important concerns about the complexity of [the prior] litigation and the posited hazard that the prior proceedings were seriously defective." 402 U.S. at 333, 91 S. Ct. at 1445.

The Court found that "no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas." 402 U.S. at 333-34, 91 S. Ct. at 1445. The Court found, instead, that "in the end, decision will necessarily rest on the trial courts' sense of justice and equity." 402 U.S. at 334, 91 S. Ct. at 1445.

Nonetheless, the Court provided substantial guidance that is consistent with the petitioner's argument here. In particular, the Court found that one factor which would indicate that an individual did not have a full and fair opportunity to litigate would be "whether without fault of his own the [litigant] was deprived of crucial evidence or witnesses in the first litigation." 402 U.S. at 333, 91 S. Ct. at 1445. While no Supreme Court decision of which the petitioner is aware has yet further analyzed this subcategory, it has been found by other courts that newly discovered evidence may preclude application of the collateral estoppel doctrine if the party against whom collateral estoppel is asserted was deprived of crucial evidence in the prior litigation without fault of his own. *See*,

e.g., *Butler v. Stover Brothers Trucking Co.*, 546 F.2d 544 (7th Cir. 1977) (estoppel not applied because court in prior case excluded certain evidence).

Here, there is substantial evidence that the state court verdict against Braen, Jr. was a gross miscarriage of justice caused by the malpractice of Braen, Jr.'s trial counsel. This miscarriage of justice could not, however, be corrected in the state court on appeal or under the New Jersey equivalent of Federal Rule 60(b) because the malpractice of the debtor's former counsel is not an available defense to a verdict on the merits, nor does it constitute inadvertence, mistake, or excusable neglect as those terms are defined under both state and federal law.

Thus, a blind adherence to the doctrine of collateral estoppel places the debtor in the position where, through no fault of his own, he is unable to obtain the "fresh start" that is the underlying purpose of the federal Bankruptcy Code. While technically, the verdict may reflect a finding of the sort of offense "against good morals" upon which the exceptions are based (*See*, *Brown v. Felsen*, *supra*, 442 U.S. at 138, 99 S. Ct. at 1213 (analyzing analogous previous Bankruptcy Act)), the debt is actually based upon factors beyond his control, and it would be fundamentally unfair to deprive him of the escape valve the Bankruptcy Code was created to establish.

It is suggested, therefore, that where, as here, the debtor in a dischargeability hearing makes a prima facie showing that his obligation to a judgment creditor resulted from a gross miscarriage of justice, whether it was a result of attorney malpractice, or for any other similar reason, such debtor should be found entitled

to a hearing on the fairness of the initial judgment in the manner outlined in the *Blonder-Tongue* decision, *supra*.

Since the decision of the Third Circuit Court of Appeals, denied petitioner such a hearing on grounds contrary to the standards set forth above,[7] and insofar as the effect of attorney malpractice on a discharge in bankruptcy has not yet been addressed by this Court, the petitioner respectfully suggests that the issuance of a writ of certiorari would be appropriate here.

ISSUE NO. 3

THE COURT OF APPEALS' DETERMINATION THAT THE DEBTOR IS COLLATERALLY BARRED FROM CONTESTING THE WILLFUL AND MALICIOUS NATURE OF HIS ACTIONS CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, WHERE SUCH DEBT EMANATED FROM AMBIGUOUS JURY INSTRUCTIONS WHICH ALLOWED THE JURY TO INFER THAT THE DEBTOR ACTED MALICIOUSLY EVEN IF HIS CONDUCT AMOUNTED TO NO MORE THAN NEG-

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[7] The Court of Appeals accepted *arguendo* the possibility that estoppel may not apply if the debtor can meet a standard similar to that of Rule 60(b). *In re Braen*, 900 F.2d at 628-29. *See particularly*, 900 F.2d at 629 n.7. According to the Court, however, such relief would only be available if the attorney, for example, "failed altogether to respond to a motion for a default judgment or motion for summary judgment." *Id.* Such a stringent standard is inconsistent with the fresh start philosophy of the Bankruptcy Code, as well as this Court's own approach in *Blonder-Tongue*, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788, which requires the Court to not only examine the record below but also consider factors not within the original trial record in determining the fairness of the original verdict. In this case, the Court of Appeals did not even discuss any of the crucial evidence Braen, Jr. was deprived of, and appears not to have, therefore, made the type of inquiry required by this Court.

LIGENT OR RECKLESS BEHAVIOR.

Because of the varied nature and philosophy of bankruptcy law, exceptions to dischargeability are to be construed strictly. *Gleason v. Thaw*, 236 U.S. 558, 35 S. Ct. 287, 59 L. Ed. 717 (1915). *See also*, Collier on Bankruptcy, Paragraph 523.03 ("[T]he statute should be strictly construed against the objecting creditor and liberally in favor of the debtor.") *See also, In Re Rahm*, 641 F.2d 755, 756-57 (9th Cir.), *cert denied* 454 U.S. 860, 102 S. Ct. 313, 70 L. Ed. 2d 157 (1981). It is also clear that the burden of proof in a discharge hearing falls upon the individual objecting to the discharge. *See* Bankruptcy Rule 4005 ("At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving his objection.").

It is also axiomatic that "collateral estoppel treats as final *only* those questions actually and necessarily decided in a prior suit." *Brown v. Felsen, supra*, 442 U.S. at 139 n.10, 99 S. Ct. 2213 n.10 (emphasis added) (*citing, inter alia, Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 210 (1979)).

There is no dispute that in order for a debtor to be denied a discharge under Section 523(a)(6) of the Federal Bankruptcy Code, the Court must find more than mere negligence or even recklessness. As explained in the legislative history to this section of the Bankruptcy Code, the willful and malicious requirement was expressly adopted to overrule the Supreme Court's decision in *Tinker v. Coldwell*, wherein the Court had found in 1902, that a bankruptcy discharge could be avoided by a finding of recklessness:

> Paragraph (6) excepts debts for "willful and malicious" injury by the debtor to another person or

> to the property of another person. Under this paragraph, "willful" means deliberate or intentional. To the extent that *Tinker v. Coldwell*, 193 U.S. 473 (1902) [24 S. Ct. 505, 48 L.Ed. 754, 11 Am. Banker. Rep. 568] held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

S. Rep. No. 85-89, 95th Cong., 2d Sess. 79 (1978); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 365 (1977); both reprinted in 3 *Collier on Bankruptcy* (15th ed. 1985).

Both the District Court in the case below, and the Court of Appeals for the Third Circuit, found that "collateral estoppel cannot preclude a debtor from contesting that he acted maliciously if the decision upon which the estoppel claim is predicated required only proof of negligence or recklessness." *In Re Braen*, 900 F.2d 621, 626 (3rd Cir. 1990). *See also*, *In Re Braen*, 94 B.R. 35, 41 (D.N.J. 1988). Both the Court of Appeals and the District Court also found that the definition given to the jury regarding malice sounded in negligence. The Court of Appeals observed, for example "We agree that, under this definition, plaintiffs could be found to have established a lack of probable cause without having established that Braen was more than negligent or reckless." *In Re Braen*, 900 F.2d at 627. See also, *In Re Braen*, 94 B.R. at 41 ("'Probable' or 'reasonable' cause is the language of negligence, and while it is possible or even probable the jury found that Braen, Jr. committed an intentional act, the charge did permit the jury to find Braen, Jr. liable for negligently or perhaps recklessly supplying false information to the authorities, leading to Laganella's indictment.").

The Court of Appeals identified some, but not all, of the instructions given to the jury which referred to a "reasonable person" standard, including the instruction that "reasonable or probable cause is defined as a reasonable ground for suspicion supported by circumstances sufficient to warrant an ordinarily prudent man in believing that party is guilty of the offense. It must be more than an unfounded suspicion." *In Re Braen*, 900 F.2d at 627. The Court also acknowledged the state court's instruction that "[t]he element of malice may be inferred from a lack of reasonable...probable cause" *Id.* The Court failed, however, to acknowledge other portions of the jury charge within which the jury was informed that "However, I will repeat conjecture, unfounded suspicions do not constitute reasonable or probable cause."

Despite the existence of these trial court instructions, the Court of Appeals essentially concluded that other jury instructions had somehow negated the trial court's repeated reference to negligence standards, with the result that the jury could not have actually found what the Judge had told them to find. *See*, *In Re Braen*, 900 F2d. at 627 ("Braen has not suggested, nor can we imagine what function [other jury instructions] served if indeed the jury could find malice based solely on the lack of probable cause."). In this passage, as well as in the citations relied upon, the Court of Appeals analyzed the conflicting jury instructions in the way a court would analyze a contract, attempting to give meaning to all of the terms. This approach is clearly inconsistent with the interpretations of the collateral estoppel doctrine enunciated by this Court, as well as the fresh start provisions under the federal Bankruptcy Code. *See, e.g.*, *Brown v. Felsen*, *supra*, 442 U.S. at 139

n. 10, 99 S. Ct. at 2213 n. 10 (stating collateral estoppel only applies to such issues as "were actually and necessarily decided" in a prior suit).

Indeed, a number of lower court cases in various jurisdictions have directly addressed the appropriate approach which a court must employ when faced with a collateral estoppel argument and ambiguous jury instructions. Under this line of cases, it has consistently been held that any question as to what the jury did, in fact, find is sufficient grounds to prevent the usage of the prior judgment in establishing collateral estoppel. *Spillman v. Harley*, 656 F.2d 224, 229 (6th Cir. 1981); *In Re Merrill*, 594 F.2d 1064, 1067 (5th Cir. 1979); *In Re Spector*, 22 B.R. 226, 231 (Bankr. N.D.N.Y. 1982). *See also*, *Kauffman v. Moss*, 420 F.2d 1270, 1274 (3rd Cir.), *cert denied*, 400 U.S. 846, 91 S. Ct. 93, 27 L. Ed. 2d 84 (1970) ("reasonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel.").

Similarly, in *Wheeler v. Laudani*, 783 F.2d. 610 (6th Cir. 1986), the Court of Appeals found that where "neither the pleadings nor the general verdict reflects that the issue of willfulness and maliciousness was actually litigated and necessary to the verdict...[as] based on the record at hand, collateral estoppel would not operate to bar relitigation of this issue." Likewise in *In Re Pereira*, 44 B.R. 248, Bankr. L. Rep. ¶70160 (Bankr. D. Mass. 1984), the Bankruptcy Court held that a judgment for libel was dischargeable because the state court libel verdict did not necessarily include a finding of willful and malicious injury and thus conclusively establish the elements of Section 523(a)(6). *See also*, *Matter of Merrill*, 594 F.2d. 1064, 1067 (5th Cir. 1979) (no collateral estoppel where party attempting to invoke it could not present

evidence regarding what was necessarily decided by the jury.")

Under the circumstances, therefore, the determination of the Court of Appeals is both in conflict with general rules of interpretation enunciated by this Court, as well as specific decisions of various other Courts of Appeals on the same issue. For this reason, the granting of a petition for certiorari is appropriate in this case.

CONCLUSION

For the reasons set forth above, petitioner respectfully suggests that the issuance of a writ of certiorari would be appropriate under all three issues presented for review.

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Dated: July 26, 1990

Filed March 30, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-5185

IN RE:
SAMUEL BRAEN. JR..
Debtor

NICHOLAS LAGANELLA AND
PT&L CONSTRUCTION CO.. INC.,

Appellants

vs.

SAMUEL BRAEN. JR.

On Appeal From the United States District
Court For the District
of New Jersey (Newark)
(D.C. Civil Action No. 88-3473)

Argued September 29, 1989

BEFORE: HIGGINBOTHAM, *Chief Judge,*
and STAPLETON and SCIRICA, *Circuit Judges*

(Opinion Filed March 30,1990)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge:*

In this appeal, we review the district court's holding that a state court malicious prosecution judgment awarded against the debtor, Samuel Braen. Jr., did not collaterally estop consideration of whether Braen had been willful and malicious within the meaning of § 523(a)(6) of the Bankruptcy Code. We conclude that the appellants have demonstrated that collateral estoppel is appropriate in this case and will therefore reverse the district court's decision.

I.

Appellants Laganella and P.T. & L. filed suit in a New Jersey state court against Braen for malicious prosecution, alleging that Braen had deliberately misinformed New Jersey authorities that Laganella and his construction firm P.T. & L. had rigged the bids on a state construction project. In response to special interrogatories given by the trial judge, the Jury found that the appellees had proved, by a preponderance of the evidence, that: (1) Braen was responsible for the institution of criminal proceedings against Laganella: (2) there was a lack of probable cause for the criminal prosecution; and (3) Braen was activated by a malicious motive in prosecuting the criminal complaint. Accordingly, the jury awarded Laganella compensatory damages of over $10 million and punitive damages of $150,000. The Superior Court of New Jersey, Appellate Division, affirmed the judgment of the trial court and the Supreme Court of New Jersey denied Braen's petition for certification.

Roughly one month after the denial of certification, Braen filed a Chapter 11 bankruptcy petition with the United States District Court for the District of New Jersey. Later that year, Laganella asked the bankruptcy court to

declare the state court judgment nondischargeable under 11 U.S.C. § 523(a)(6), which provides that a creditor can avoid the discharge of a debt incurred "for willful and malicious injury by the debtor ...." Laganella contended that since Braen was found to have acted willfully and with malicious intent in the New Jersey proceeding, collateral estoppel barred reconsideration by the bankruptcy court of whether Braen's conduct satisfied § 523(a)(6) 's culpability requirement. Braen responded that issue preclusion was not justified in this case for three reasons: (1) Laganella was required to shoulder a less onerous burden of proof in the state proceeding than is required by § 523; (2) the state trial judge's instructions permitted the jury to find Braen liable based on a finding that Braen had acted only negligently or recklessly, and (3) that, because Braen was ill and his lawyer was negligent during the state court action, the application of issue preclusion to this case would be unfair.

The bankruptcy court rejected each of Braen's contentions and consequently held the malicious prosecution judgment nondischargeable. The district court reversed and remanded for an evidentiary hearing on whether Braen had been "willful and malicious" within the meaning of § 523(a)(6). We have jurisdiction under 28 U.S.C. § 1292(b).

II.

A.

The jury in the malicious prosecution suit found that Laganella established Braen's malicious motive by a preponderance of the evidence. Braen asserts that a creditor seeking to avoid discharge in bankruptcy must prove one of the grounds listed in § 523-- in this case a willful and malicious injury -- by clear and convincing evidence. Accordingly, Braen argues that because Laganella bore a lesser burden of proof in the malicious prosecution suit than is required by § 523, collateral estoppel does not apply.

We agree that disparate burdens of proof foreclose application of the issue preclusion doctrine.[1] We disagree, however, with Braen's contention that a creditor seeking to avoid discharge under § 523(a)(6) must prove malice by more than a preponderance of the evidence.

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[1] See § 28(4) of the Restatement (Second) of Judgments:

> Although an issue is actually litigated and determined by a valid and final judgement, and the determination is essential to the judgement, relitigation of the issue in a subsequent action between the parties is not precluded ... [if] the adversary [of the party sought to be precluded] has a significantly heavier burden than he had in the first action.

Accord O'Shea v. Amoco Oil Co., 886 F.2d 584 (3d Cir. 1989) (applying New Jersey law). See also Restatement (Second) of Judgments § 28 comment f, illustration 10 (concluding that a clear and convincing standard is sufficiently heavier than a preponderance of the evidence standard to trigger § 28).

Debts arising out of "willful and malicious injury by the debtor" are not the only obligations that § 523 excepts from discharge. Subsection (a) lists nine categories of nondischargeable debts, most of which contain a number of subcategories. The excepted debts arise in many disparate circumstances. Included as nondischargeable obligations, among others, are debts arising out of: (1) taxes or customs duties; (2) obtaining money, property, or services by false pretenses; (3) claims that were not timely filed; (4) fraud while acting in a fiduciary capacity, embezzlement, or larceny; (5) alimony or support; (6) fines, penalties and forfeitures; (7) education loans; and (8) judgments or consent decrees in suits based on the debtor's operation of a vehicle while intoxicated. Because Section 523 covers so many disparate circumstances, we doubt that Congress, without so stipulating, expected bankruptcy courts to apply a single standard of proof in all instances where a creditor asks for a declaration of nondischargeability. The suggestion, for example, that Congress intended the courts to require of spouses alleging a failure to pay child support the same kind of clear and convincing evidence universally required of creditors claiming fraud strikes us as far fetched.

Moreover, we have searched in vain for a satisfying

explanation as to why Congress would have wished to insist on any more or any less assurance of reliability in a § 523 decision favoring the creditor than would normally be required to establish that particular kind of debt in any other proceeding. While Braen suggests that the "fresh start" policy behind the Bankruptcy Act provides such an explanation, we are unpersuaded. Although it is true that the bankruptcy laws were generally intended to give troubled debtors a second chance, the nondischargeability exceptions reflect Congress' belief that debtors do *not* merit a fresh start to the extent that their debts fall within § 523. *See Combs v. Richardson*, 838 F.2d 112 (4th Cir. 1988). In essence, Braen argues that the fresh-start policy should guide the bankruptcy court's decision as to whether a claim is of a type that *does not* warrant fresh-start treatment. To the contrary, we believe the "fresh start" policy underlying the Code provides no help in determining what Congress intended regarding standards of proof.

Finally, we believe that Congress may well have seen an important utility in a nondischargeability scheme that provides the same degree of assurance of reliability in a § 523 proceeding as that which normally would be required in another proceeding to establish the same kind of debt. We

find nothing in the text or legislative history suggesting that Congress contemplated that a debt previously established in a judicial proceeding to be of the type that is nondischargeable would have to be relitigated in the bankruptcy court. Yet that is precisely the kind of waste of judicial resources that acceptance of Braen's theory would require. If we were to adopt his suggestion and require proof of malice by clear and convincing evidence, relitigation would be required in virtually every proceeding under § 523(a)(6) since, with the sole exception of defamation in "public figure" cases, states normally require that malice in the context of a tort suit be proven by a preponderance of the evidence. We decline to attribute to Congress an intention that would require the bankruptcy court to engage in duplicative proceedings of this kind.

This conclusion is not, as Braen suggests, at war with a host of contrary authority. To the contrary, we find it supported by the better reasoned legal precedent. While six courts of appeals have applied the clear and convincing evidence standard in proceedings under § 523, all but one of those decisions involved claims under § 523(a)(2) — the exception for indebtedness arising from fraud.[2] As we have

[2] The decisions involving claims under § 523(a)(2) are: (1) *In re Martin*, 761 F.2d 1163 (6th Cir. 1985); (2) *In re Kimzey*, 761 F 2d 421 (7th Cir. 1985); (3) *In re Van Horne*, 823 F.2d 1285 (8th Cir. 1987); (4) *In re Garner*, 881 F.2d 579 (8th Cir. 1989); (5) *Driggs v. Black*, 787 F.2d 503 (10th Cir. 1986); and (6) *In re Dougherty*, 84 B.R. 653 (9th Cir. BAP 1988).

noted, in contrast to actions for malicious prosecution, common law actions for fraud have historically employed the heavier clear and convincing evidence burden of proof. *See, e.g., Lalone v. United States*, 164 U.S. 255, 257 (1896) ("In all proceedings instituted ... on the ground of alleged fraud practiced by a defendant upon a plaintiff, the rule is of long standing and is of universal application, that the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and convincing."). Consequently, the fact that virtually all courts have adopted the clear and convincing standard in disputes under § 523(a)(2) comports with our view that the appropriate burden of proof under § 523 is the prevailing standard used by courts to resolve the types of claims underlying the particular exception at issue.

Only two courts of appeals have commented on the appropriate standard in cases under § 523(a)(6). Of the two, one uses the clear and convincing standard, *Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257 (11th Cir. 1988), and one adopts the preponderance of the evidence standard, *Combs v. Richardson*, 838 F.2d at 112. In *Chrysler Credit*, the required standard of proof was not at issue: the court simply observed, by way of *dicta*, that there was "no question but that the party seeking to except a debt from discharge [under § 523(a)(6)]

must prove the willfulness and maliciousness of the act by clear and convincing evidence." 842 F.2d at 1262. In *Combs*, however, the issue was directly before the court and we find the court's analysis entirely convincing. *See* 838 F.2d at 116. We therefore hold that creditors claiming a nondischargeable debt under § 523(a)(6) must prove a malicious and willful injury inflicted by the debtor by a preponderance of the evidence.[3] Because Laganella and P.T. & L. bore the same burden in the malicious prosecution suit, the finding in that suit deserves preclusive effect in this case, assuming that no other exception to issue preclusion applies.

B.

Braen claims that the state court in the malicious prosecution action defined malice more liberally than does § 523 (a)(6) and therefore that the prior litigation did not resolve whether Braen acted "willfully and maliciously"

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[3] The bankruptcy court reached this same result, but reasoned that it was required, under *Butner v. United States*, 440 U.S. 48 (1979), to apply New Jersey's burden of proof. *Butner* held only that the bankruptcy code, as a general rule, left the definition of property rights to state law. The Court's opinion expressly notes that Congress has the power to reshape those rights in bankruptcy and has exercised that power to displace state law rights in several contexts. 440 U.S. at 54 & n.8. The nondischargeability provisions are one context in which it has done so. The exceptions to the general rule of nondischargeability are federal substantive law; the procedures pursuant to which nondischargeability is established under § 523(a)(6) -- whether provided by statute or federal common law--are also matters of federal law.

within the meaning of § 523. Specifically, Braen contends that the state court's instructions to the jury permitted it to find him liable for malicious prosecution if it found he had acted only recklessly or negligently when he informed authorities that Laganella and P.T. & L. had rigged bids. Since, in contrast, creditors asserting a "malicious and willful injury" under § 523(a)(6) must prove that the debtor intentionally inflicted the claimed injury,[4] Braen argues that the malicious prosecution decision was not based on a level of culpability that satisfies the nondischargeability standard.

We agree that collateral estoppel cannot preclude a debtor from contesting that he acted maliciously if the decision upon which the estoppel claim is predicated required only proof of negligence or recklessness. Consequently, the merit of this second contention depends on whether, as Braen claims, the judge in the malicious prosecution suit instructed the jury it could find Braen liable if it concluded

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4 Collier explains the culpability standard under § 523(a)(6):

> An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill will. The word "willful" means "deliberate and intentional," a deliberate and intentional act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury.

3 Collier, *Collier on Bankruptcy* ¶1523.16[1] (L. King 15th ed. 1989).

he had been negligent or reckless. As on all occasions when we interpret jury instructions, we consider the totality of the instructions and not a particular sentence or paragraph in isolation. *See, e.g., United States v. Piccolo*, 835 F.2d 517, 520 (3rd Cir. 1987).

Braen's contention that the state court permitted the jury to find malice based on only negligent conduct focuses on two separate portions of the jury instructions. He points first to the court's instructions on the element of lack of probable cause, according to which, "reasonable or probable cause is defined as a reasonable ground for suspicion supported by circumstances sufficient to warrant an ordinarily prudent man in believing that party is guilty of the offense. It must be more than an unfounded suspicion." App. at 231. We agree that, under this definition, plaintiffs could be found to have established a lack of probable cause without having established that Braen was more than negligent or reckless. Braen then points to a later remark by the trial judge that [t]he element of malice may be inferred from a lack of reasonable . . . probable cause." App. at 234. He reasons that if the lack of probable cause element could exist without Braen being more than negligent or reckless and the court told the jury that it could infer that he acted maliciously from the absence

of probable cause, the jury may have found for the plaintiffs even though it believed Braen was no more than negligent or reckless.

We interpret these instructions differently. In the first place, the trial judge twice defined malicious motive as "the *intentional* doing of a wrongful or unlawful act without just cause or excuse." App. at 233, 236 (emphasis added). Secondly, the court's instructions made it clear that the malicious prosecution tort consisted of three distinct elements and that the plaintiff bore the burden of establishing each element by a preponderance of the evidence. The trial judge summarized the plaintiff's burden as follows:

> So, the plaintiff in order to . . . prevail . . . must prove by a preponderance of the evidence that the defendant caused the criminal proceedings to be instituted against him. And also by a preponderance of the evidence, must prove that there was a lack of reasonable or probable cause for the criminal prosecution. Third, that the defendant or defendants were activated by malicious motive in proceeding with the criminal complaint.

App. at 234-35. Consistent with these instructions, the court then provided the jury with special interrogatories which separately addressed each of the elements of the tort. As to

Braen, the jury answered the special interrogatories as follows:

> 1. Do you find the plaintiff has proved by a preponderance of the evidence that the named defendants acted to bring about or were responsible for the institution of [sic] underlying criminal proceeding against plaintiff?
>
> A. Yes
>
> 2. Do you find that plaintiff has proved by a preponderance of the evidence that there was a lack of reasonable or probable cause for the criminal prosecution?
>
> A. Yes
>
> 3. Do you find that the plaintiff has proved by a preponderance of the evidence that the defendant was activated by malicious motive in prosecuting the criminal complaint against the plaintiff.
>
> A. Yes

App. at 247-49. These instructions, taken as a whole, clearly required the jury to find that Braen acted intentionally and with an improper motive when he wrongly asserted that Laganella had rigged bids.

Nor is the trial judge's remark that the jury could

infer malice from the lack of probable cause contrary to this conclusion. Braen asserts that the statement permitted the jury to equate malice with an absence of probable cause. As noted earlier, however, the trial court clearly defined (three times) lack of probable cause and malicious motive as separate elements with distinct requirements. Braen has not suggested, nor can we imagine, what function that careful distinction served if indeed the jury could find malice based solely on the lack of probable cause. In essence, Braen asks us to construe the court's instructions in a manner that renders useless all discussion of the malice requirement, a result contrary to our basic rules of construction. *J.E. Fatlin Motor Transp. v. Eazor Express*, 273 F.2d 444 (3d Cir. 1959) ("It would not be good interpretation to disregard language . . . as meaningless or absurd if that can be avoided."); *see also Restatement (Second) of Contracts* § 236(a) (1979) ("An interpretation which gives a reasonable, lawful, and effective meaning to all manifestations of intention is preferred to an interpretation which leaves part of such manifestations unreasonable, unlawful, or of no effect.").

We therefore conclude that the most reasonable interpretation of the charge explaining the jury's ability to find malice based on inferences drawn from the evidence is

that evidence establishing lack of probable cause may also support inferences that the defendant had acted intentionally with a malicious motive. We see nothing problematic with that suggestion. If the known facts fall so far short of probable cause that a person of common prudence would recognize its absence, one may infer that the defendant recognized its absence and intentionally went forward with an ulterior motive. Consequently, we conclude that the state court's instructions provide no basis for declining to apply the issue preclusion doctrine.

C.

A central tenet of issue preclusion directs that collateral estoppel bars reconsideration of only those issues that the parties had a full and fair opportunity to litigate. Based on this principle, Braen argued before the bankruptcy court that the application of collateral estoppel to his case was not fair for two reasons: (1) he was too ill at the time of the malicious prosecution to rebut the plaintiff's charges, and (2) his attorney acted negligently by failing to examine important documents and neglecting to make potentially helpful arguments at trial. The bankruptcy court rejected Braen's request for a hearing on the grounds that such considerations

should have been raised in the state court appeals process and were irrelevant to the application of collateral estoppel. On appeal, Braen convinced the district court that he at least deserved a hearing on the full and fair opportunity issue.

Subsection 28(5) of the Restatement (Second) of Judgments states as follows:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded [if] *[t]here is a clear and convincing need for a new determination of the issue . . . because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.*

Comment j to this section adds that an exception may be appropriate when "one of the parties may have been laboring under a mental or physical disability that impeded effective litigation and that since has been removed." The Restatement cautions, however, that the instances in which subsection (5) justifies an exception to preclusion "must be the rare exception, and litigation to establish an exception in a particular case should not be encouraged. Thus it is important

to admit an exception only when the need for a redetermination of the issue is a compelling one." *Restatement (Second) of Judgments* § 28(5) comment g (1980).

For purposes of this case, we may accept Braen's assertion that the Restatement's view is the appropriate one. *See Blonder-Tongue Labs v. University of Illinois Foundation*, 402 U.S. 313 (1971) . We conclude, however, that the evidence that Braen tendered to the bankruptcy court on this issue, even if accepted as true, would not satisfy the Restatement standard. Accordingly, Braen was not entitled to a hearing on this issue.[5]

Braen argued to the bankruptcy court that his lawyer in the state court proceeding provided deficient representation because he failed to discover and present at trial readily available evidence supporting Braen's side of the story.[6] The

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[5] The district court suggested that our opinion in *Matter of Ross*, 602 F.2d 604 (3d Cir. 1979), compelled the bankruptcy court to conduct an evidentiary hearing on Braen's fairness arguments. On the contrary, *Ross*'s discussion concerning the desirability of a hearing in the context of that case pertained only to collateral estoppel's core requirements: "(1) the issue sought to be precluded must be the same as that involved in the prior action; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment." *Id.* at 608 (quoting *Halse v. Hanover Insurance Co.*, 536 F.2d 576, 579 (3d Cir. 1976)). *Ross* does not suggest that an evidentiary hearing on the fairness of the prior proceeding should be held as a matter of course. Clearly, bankruptcy courts need not conduct such a hearing where, as here, the debtor's allegations, even if taken as true, would not justify an exception to the general rule of issue preclusion.

[6] Thus, Braen does not argue that there is newly discovered evidence that could not have been secured for trial with reasonable diligence.

general rule is that "ignorance or carelessness of an attorney" does not provide a basis for relief from the effects of an adverse civil judgment. Cases abound in which petitions for relief from judgment under Rule 60(b) on this ground have been denied. *See Blinder, Robinson & Co. v United States*, 748 F.2d 1415 (3d Cir. 1984); *Smith v. Bounds*, 813 F.2d 1299, 1304 (4th Cir. 1987), *cert. denied*, 109 S. Ct. 176 (1988); *Cline v. Hoogland*, 518 F.2d 776 (8th Cir. 1975); *Bershad v. McDonough*, 469 F.2d 1333, 1336-37 (7th Cir. 1972); *Greenspahn v. Joseph E. Seagram & Sons*, 186 F.2d 616 (2nd Cir. 1951).[7] The courts recognize that granting relief because a party "should not be penalized for the omissions of his own attorney would be visiting the sins of [that party's] lawyer upon the [opponent]." *Link v Wabash Railroad Co.*, 370 U.S. 626, 634 n.10 (1962).

The only cases we have found in which a lawyer's defalcation has been held to warrant relief from the consequences of a judgment are cases in which the client was deprived of his day in court because his lawyer failed alto-

[7]Though Braen attacks the earlier proceeding collaterally and not under Rule 60(b), similar considerations govern the two contexts. Neither Braen nor we found a single case in which the court denied a prior judgment preclusive effect based on lawyer defalcation. Though Braen contends that *Ackerman v. Ackerman*, 676 F.2d 898 (2d Cir. 1982), supports his claim, in fact, that decision was based upon the widely-recognized exception that a subsequent court will not find issue preclusion where the losing party in the prior suit had no incentive to litigate the matter at issue in the subsequent suit.

gether to respond to a motion for a default judgment or a motion for summary judgment. *E.g., Boughner v. Secretary of HEW*, 572 F.2d 976 (3d Cir. 1978); *Augusta Fiberglass Coatings Inc. v. Fodor Contracting Corp.*, 843 F.2d 808 (4th Cir. 1988). Here Braen clearly had a full and fair opportunity to litigate his case. The trial lasted for two weeks, and his attorney mounted a substantial defense. The case went to the jury and Braen lost. To now release him from the consequences of that loss because his attorney did not put forward all there was to tender would seriously undermine the doctrine of issue preclusion and impose an unjust burden on prevailing litigants and the legal system.

Turning to Braen's "poor health" argument, it is undisputed that Braen (1) knew throughout the state court proceedings that he faced the potential of a multimillion dollar judgment, (2) attended each day of the two week trial, (3) testified at length during that trial, and (4) did not assert "poor health " in support of his post-verdict arguments to the state trial and appellate courts that the trial violated due process. The transcript of his testimony demonstrates that he was alert and responsive to questioning on both direct and cross and that his memory was intact. App. at 571-657. There was thus compelling support before the bankruptcy court for

the conclusion that Braen had the incentive and capacity to defend himself. The only medical evidence submitted by Braen in support of a contrary conclusion consisted of three letters from his physician, each dating from a period between five and seven and one-half years before trial, that describe his need for hemodialysis. None mention any symptoms that would impair his ability to participate meaningfully in his defense.

On this record, we conclude that the district court erred in overturning the bankruptcy court's denial of an evidentiary hearing.

III.

The bankruptcy court did not err in holding that issue preclusion barred Braen from relitigating whether Laganella's judgment was a debt incurred "for willful and malicious injury by the debtor". 11 U.S.C. § 523(a)(6). Accordingly, the district court's order of November 18. 1988 will be reversed and the case will be remanded with instructions that the bankruptcy court's order of June 21, 1988 be reinstated.

A True Copy:

Teste:

Clerk of the United States of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

C.A. No. 87-3473

APPEAL FROM THE UNITED STATES
BANKRUPTCY COURT FOR THE DISTRICT
OF NEW JERSEY

DECIDED NOVEMBER 18, 1988 AS AMENDED
JANUARY 24, 1989

CAPTION OMITTED IN PRINTING

WOLIN, District Judge.

Currently before the Court is an appeal from an order of the Bankruptcy Court finding appellant's debt to the appellee nondischargeable under Section 523(a)(6) of the Federal Bankruptcy Code 87 B.R. 841. For the reasons set forth below, the decision of the Bankruptcy Court is reversed and the case is remanded back to the Bankruptcy Court for further proceedings consistent with this opinion.

I. BACKGROUND

On February 25, 1980, plaintiffs-appellees Nicholas Laganella ("Laganella") and P.T. & L. Construction Co., Inc. ("PT & L"), filed a complaint for malicious prosecution in the Superior Court of the State of New Jersey, wherein debtor-appellant Samuel Braen, Jr. ("Braen Jr."), was one of several defendants The complaint stated that sometime prior to 1975 Braen Jr. did maliciously and without probable cause instigate and proximately cause Laganella to be indicted in certain state criminal proceedings.

The malicious prosecution suit charged Braen Jr. with giving false information to the Division of Criminal

Justice of the State of New Jersey that resulted in indictments against Laganella and PT & L. These indictments charged Laganella and PT & L with involvement in a bid-rigging conspiracy entered into with Braen Jr. Braen Jr. furnished the information regarding Laganella while he, himself, was under indictment for shortweighting of asphalt supplied in connection with the paving of the Palisades Interstate Parkway. Apparently, Braen Jr. had been promised that the indictment against him would be dropped if he furnished information about corruption in the field of road construction and road paving jobs in northern New Jersey.

Laganella and PT & L were subsequently acquitted of the criminal charges by a jury in 1979. However, prior to this acquittal, a hearing examiner for the New Jersey Department of Transportation found that in view of "all the relevant evidence, the inconsistencies of their testimony and the interest or lack of interest of a witness in the outcome of the hearing and from all these circumstances ... I have determined that the weight or preponderance of the evidence demonstrates the lack of moral integrity on the part of PT & L and Nicholas Laganella." Based on these findings, the examiner recommended and the Commissioner entered an order continuing the suspension of PT & L and Laganella from the

list of qualified bidders entitled to do work for the state. The suspension, which began when Laganella was first indicted was ordered to continue for a period of five years from the original December 27,1974, date of suspension.

Following the acquittal on the criminal charges, Laganella and PT & L brought suit on February 25,1980 against Braen Jr. and others, alleging malicious prosecution and tortious interference with economic relations, as well as conspiracy with respect to both torts. After the plaintiffs and defendants had presented their case to the jury, the trial judge charged the jury solely on the issue of malicious prosecution. The charge, in pertinent part, stated:

> [I]f you find that the defendant did not have an honest belief that the plaintiff was guilty, and that the charges were thereby falsely brought, you must conclude that there was no reasonable or probable cause. The plaintiff must establish that the defendant was activated by malicious motive in prosecuting the criminal or moving the criminal proceedings, giving that information which brought about the criminal proceedings against the plaintiff. Not malice in the sense that the word is sometimes used, the kind of malice I speak of means the intention or doing of a wrongful or unlawful act which an ordinary cautious man would realize that under the circumstances damage would result to one's person or one's property. The element may inferred from a lack of reasonable or probable cause.

* * * * * *

I think it may be proper if I again define for you the term malice. Malice, in this connection, means the intention [sic] commission of a wrongful act without just cause or excuse, but malice in the law means nothing more than an intentional doing of a wrongful act without justification or excuse. What is a wrongful act? The meaning of that definition, any act which in the ordinary course would infringe upon the rights of another to his damage is wrongful, except if it be done in the exercise of an equal or superior way. Malice must be inferred from a lack of probable cause.[1]

After being instructed by the judge, the jury was given a questionnaire to aid in its deliberations. In this questionnaire the jury was asked, *inter alia*, the following questions:

1. Do you find that plaintiff has proved by a preponderance of the evidence that the named defendants acted to bring about or were responsible for the institution of underlying criminal proceeding [sic] against plaintiff Nicholas Laganella.
2. Do you find that plaintiff has proved by a preponderance of the evidence that there was a lack of reasonable or probable cause for the criminal prosecution.

[1]The trial transcript was later changed to read: "Malice may be inferred from a lack of probable cause." The Court finds the discrepancy to be of no significance.

3. Do you find that plaintiff has proved by a preponderance of the evidence that the defendant/defendants was/were activated by a malicious motive in prosecuting the criminal complaint against plaintiff.

The jury answered these questions in the affirmative and rendered a verdict in favor of the plaintiffs. Laganella and PT & L were awarded compensatory damages of $10,000, 175.00 and punitive damages of $150,000.00. On October 9, 1985, the Appellate Division of the State of New Jersey affirmed the jury verdict in favor of Laganella and PT & L against Braen Jr. On September 8, 1986, a petition for certification filed by Braen Jr. was denied by the New Jersey Supreme Court.

On October 8, 1986, Braen Jr. filed a voluntary Chapter 11 bankruptcy petition before the U.S. Bankruptcy Court, District of New Jersey. Laganella brought an action to have the judgment found nondischargeable and moved for summary judgment, arguing that the judgment Braen Jr. owes to him is non-dischargeable under the Bankruptcy Code, 11 U.S.C. § 523(a)(6).[2] In an opinion dated June 8,

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[2] The section provides:
§ 623(a) A discharge under section 727, 1141 or 1328(b) of this title does not discharge an individual debtor from any debt.—(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

1988, Judge Tuohey of the Bankruptcy Court found that Braen Jr.'s debt to Laganella was nondischargeable under § 523(a)(6). Judge Tuohey gave collateral estoppel effect to the state court malicious prosecution verdict and found that Braen Jr. was thus precluded by the state court verdict from contesting the issue of whether Braen Jr. had willfully and maliciously injured Laganella. It is this opinion and, specifically the decision of the Bankruptcy Judge to give collateral estoppel effect to the state court verdict, that Braen Jr. now appeals to this court.

II. DISCUSSION

The debtor, Braen Jr., appeals from the Bankruptcy Court's opinion and order, contending that the Bankruptcy Court erred in applying collateral estoppel effect to the state court jury verdict on appellee Laganella's malicious prosecution claim. Sitting as an appellate tribunal, this Court's authority is limited to setting aside fact findings which are clearly erroneous. Bankruptcy Rule 8013. The Court does, however, enjoy plenary review of the Bankruptcy Court's resolution of legal questions. *Universal Minerals, Inc. v. C.A. Hughes*, 669 F.2d 98, 103 (3d Cir. 1981); *Matter of Elin*, 20 B.R. 1012, 1015 (D.N.J. 1982).

The Bankruptcy Court's decision to apply collateral estoppel was a resolution of a legal question and is now properly subject to review. To facilitate that review, the Court will analyze the Bankruptcy Court's decision in conjunction with the three main points the appellant raises on appeal: (1) The proper standard of proof for establishing a debt as non-dischargeable under the Bankruptcy Code is "clear and convincing" thus preventing a Bankruptcy Court from affording collateral estoppel effect to a state court judgment based on a "preponderance of the evidence" standard; (2) The state court verdict for malicious prosecution was based on a jury charge which could support a judgment based on mere negligence. Thus the Bankruptcy Court erred in applying collateral estoppel effect to the verdict on the issue of whether Braen Jr. willfully and maliciously injured Laganella within the meaning of § 523(a)(6); (3) The Bankruptcy Court erred in applying collateral estoppel effect to the state court verdict without first examining the fairness of the state court proceeding, including the competence of counsel, the health of the defendant Braen Jr. and the possibility that significant evidence was not included in the trial.

A. *The Standard of Proof in Dischargeability Cases.*

The Third Circuit, in *Matter of Ross*, 602 F.2d 604 (3d Cir.1979), held that collateral estoppel could be used by bankruptcy courts to preclude relitigation of an issue previously litigated in another court. The court in *Ross* found preclusion would be proper if the bankruptcy court found that:

> (1) The issue sought to be precluded [was] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a valid and final judgment; and (4) the determination [was] essential to the prior judgment.

Id at 607-08.

Inherent in the first factor mentioned in *Ross* is the general rule that collateral estoppel cannot apply when the standard of proof in a previously adjudicated matter is less stringent than that in a later proceeding. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 4422 (1981); *United States v. Rylander*, 714 F.2d 996, 1002 (9th Cir.1983) ("It is an elementary [sic] principal of issue preclusion that it may only be asserted where the burden of proof as to that issue is no greater than it was in the prior proceeding where the issue was decided.").

In order to review whether the bankruptcy judge properly applied collateral estoppel to the state court verdict in this case, it is necessary to compare the standards of proof required in the state court proceeding and the Bankruptcy Court discharge proceeding.

The state court malicious prosecution trial was governed by a preponderance of the evidence standard. What is disputed is the proper evidentiary standard for a bankruptcy discharge proceeding. The appellant debtor Braen Jr. argues that bankruptcy discharge cases are governed by a "clear and convincing" evidence standard with the burden on the creditor to prove why the disputed debt should not be discharged. Appellee argues that the Bankruptcy Court correctly determined that bankruptcy discharge proceedings are covered by a preponderance of the evidence standard, and thus properly gave collateral estoppel effect to the state court verdict. The Court agrees with the appellant.

While the Third Circuit has not addressed the question, at least five circuits have found that a bankruptcy discharge proceeding is governed by a clear and convincing standard. See *Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257,1262 (11th Cir.1988) ("There is no question but that the party seeking to except a debt from discharge must prove

the willfulness and maliciousness of the act by clear and convincing evidence."); *In re Dougherty*, 84 B.R. 663 (9th Cir. BAP 1988); *In re Van Horne*, 823 F.2d 1285, 1287 (8th Cir.1987) ("Creditors bear the burden of proof, Bank. R. 4006, and must prove each element of their crime by clear and convincing evidence."); *In re Kimzey*, 761 F.2d 421 (7th Cur.1985); *In re Martin*, 761 F.2d 1163 (6th Cir.1985). See also Ferriell, The Preclusive Effect of State Court Decisions in Bankruptcy, 58 Am. Bankr. L.J.. 349, 362 n. 84 1983) ("The overwhelming majority of bankruptcy courts apply a 'clear and convincing' standard of proof in nondischargeability proceedings.")

In response to the above authority, appellee and the bankruptcy court below rely on *Combs v. Richardson*, 838 F.2d 112 (4th Cir.1988) and *In re Daboul*, 85 B.R. 197 (Bankr.D.Mass.1988) for the proposition that this bankruptcy discharge proceeding is governed by a preponderance of the evidence standard. In *Combs*, the court did not address the above circuit court decisions to the contrary, but found that:

> The policies of the Bankruptcy Code are best effectuated by requiring that creditors prove by a preponderance of the evidence the willfulness and maliciousness of the debtors' acts.

Combs, 838 F.2d at 116. In *Daboul*, the Bankruptcy Court apparently construed Combs to support the view that bankruptcy courts should look to state law for guidance on what standard of proof to apply. *Daboul*, 85 B.R. at 200. The Bankruptcy Court below, in turn, relies on *Daboul* and *Combs* to support its finding that the current bankruptcy proceeding is governed by New Jersey's preponderance of the evidence standard for malicious prosecution cases. *Laganella v. Braen*, 87 B.R. 841, 845 (Bankr.D.N.J.1988). It is this finding of law that must now be reversed.

Federal control over bankruptcy matters derives from the constitutional mandate of Article 1, Section 8, Cl. 4 to establish "uniform laws on the subject of bankruptcies throughout the United States." As part of this mandate, Congress has enacted Section 523(c), Title 11 U.S.C., which grants the bankruptcy court exclusive jurisdiction over exceptions to discharge based on debts arising from the debtor's fraud, false representations or responsibility for willful and malicious injuries. *Brown v. Felsen*, 442 U.S. 127, 135-36, 99 S.Ct. 2205, 2211, 60 L.Ed.2d 767 (1979). Clearly, an integral part of any dischargeability proceeding is the standard of proof required for a creditor to demonstrate a particular debt is nondischargeable. While the Bankruptcy Code does

not provide an evidentiary standard, the clear majority of federal courts, by adopting a clear and convincing standard for dischargeability proceedings, have created persuasive federal common law on the subject which this Court deems proper to follow as the best means of effectuating the "fresh start" policy of federal bankruptcy law.

The Bankruptcy Court, relying on *Daboul*, seizes on the fact that the many circuit courts which have found that a clear and convincing standard applies in discharge proceedings have not done so in the context of issue preclusion involving state court judgments. In these cases, the Bankruptcy Court found that the state standard of proof should apply in the discharge proceeding, which, of course, would justify applying collateral estoppel effect to the state judgment, itself. For this proposition, the court below relies on *Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). However, *Butner* is concerned with the analysis of *property interests* in bankruptcy proceedings when those interests are not covered under federal law. In contrast, the question of what standard of proof applies in a congressionally mandated discharge proceeding, which is under the exclusive domain of the federal bankruptcy courts goes to the essence of the discharge proceeding itself. The fact that the Bankruptcy Code

fails to set out an evidentiary standard does not mean that the standard is akin to a property interest which can be defined under state law. The Bankruptcy Court's reliance on *Butner* is thus inapposite. Moreover, it would be an anomalous result for the standard of proof in discharge proceedings to depend on whether the proceeding concerned the collateral estoppel effect of a state court judgment or instead involved an independent determination of dischargeability by the Bankruptcy Court.

Therefore, in the absence of a clear congressional, Supreme Court or Third Circuit determination to the contrary, this Court finds that the weight of federal authority supports the view that a clear and convincing evidentiary standard is required in bankruptcy discharge proceedings. Given this standard, the Bankruptcy Court erred when it afforded collateral estoppel effect to the state court malicious prosecution verdict, which was based on a preponderance of the evidence standard. On remand, the Bankruptcy Court must conduct an independent hearing in which the appellee must prove by clear and convincing evidence that the appellant willfully and maliciously injured him.

B. *The Malicious Prosecution Verdict As Support For a Finding of Willful and Malicious Injury Under Section 583(a)(6) of the Bankruptcy Code.*

Section 523(a)(6) of the Bankruptcy Code provides that an individual debtor will not be granted a discharge from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." While "willful and malicious injury" can be subject to somewhat different interpretations, it is clear from the legislative history of the section that the language was not intended to prevent the discharge of debts for either negligently or recklessly caused injuries.

> Paragraph (6) [5] excepts debts for willful and malicious injury by the debtor to another person or to the property of another person. Under this paragraph, "willful" means deliberate or intention. To the extent that *Tinker v. Coldwell [Colwell]*, 193 U.S. 473 [1904] (1902) [24 S.Ct. 505, 48 L.Ed. 754, 11 Am.Bankr. Rep. 568] held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard standard, they are overruled."

S.Rep.No. 95-989, 95th Cong., 2d Sess. 79 (1978); H.R.Rep. No. 95-595, 95th Cong. 1st Sess. 365 (1977), U.S.Code

Cong. & Admin.News 1978, pp. 5787, 5865, 6320; both reprinted in 3 *Collier on Bankruptcy* (15th ed. 1985).

Appellee argues that a malicious prosecution case "by definition" is an intentional tort. Appellees' Brief in Opposition, p. 19. The Bankruptcy Court, relying on a New Jersey court's definition of "malice" as "the intentional commission of a wrongful act without just cause or excuse," *Laganella v. Braen, Jr.*, 87 B.R. at 846 (quoting *Mayflower Industries v. Thor Corp.*, 15 N.J. Super. 139, 152, 83 A.2d 246 (Ch.Div. 1951)), found that the New Jersey tort of malicious prosecution "comports with the definition in the United States Bankruptcy Code as set forth in Section 523(a)(6) which defines certain actions as nondischargeable." *Laganella v. Braen*, 87 B.R. at 846.

The Court finds that, while the above definition of malice relied upon by the Bankruptcy Court was contained in the jury charge in the state case, the entire jury charge contained several references to reasonable and "probable" cause. See *supra* at pp. 37-38. The State of New Jersey is, of course, free to define the tort of malicious prosecution as either a negligent or intentional tort, and can use the term "lack of reasonable cause" in establishing a standard for liability. However, in the context of bankruptcy discharges,

only an intentional injury will suffice to prevent discharge of the debt under 523(a)(6).

The critical element in the jury charge and questionnaire is the definition of the term "malice". However, malice is defined in the charge in two different ways. At one point the judge charged: "Malice ...means the intention [sic] commission of a wrongful act without just cause or excuse," but the jury was also instructed: "Malice may be inferred from a lack of probable cause." *See supra* at p. 37.

"Probable" or reasonable cause is the language of negligence, and while it is possible or even probable the jury found that Braen Jr. committed an intentional act, the charge did permit the jury to find Braen Jr. liable for negligently or perhaps recklessly supplying false information to the authorities, leading to Laganella's indictment. In *Matter of Ross*, 602 F.2d 604, 607 (3d Cir.1979), one condition for applying collateral estoppel effect to a judgment is that "The determination [of the issue] must have been essential to the prior judgment." In the case at bar, it was not essential for the jury in the state case to have found Braen Jr. acted intentionally because they could have found him liable for acting "without reasonable or probable cause." Thus, the Bankruptcy Court erred when it applied collateral estoppel effect to the state

verdict on the issue of whether Braen Jr. acted willfully and maliciously in the context of a § 523(a)(6) discharge proceeding. *See In re Held*, 734 F.2d 628, 630 (11th Cir. 1984); *Kauffman v.* Moss, 420 F.2d 1270, 1274 (3d Cir.), *cert. denied*, 400 U.S. 846, 91 S.Ct. 93, 27 L.Ed.2d 84 (1970); *In the Matter of Rowland, (1988)* [available on WESTLAW, 1988 WL 73431]. On remand, the Bankruptcy Court must independently determine whether Braen Jr. acted willfully and maliciously toward the appellee.[3]

C. *Consideration of the Underlying Fairness of the State Court Proceeding.*

Because this Court has already determined that the Bankruptcy Court may not apply collateral estoppel effect to the state court verdict, it is not necessary to discuss in detail the extent to which the Bankruptcy Court may have erred by refusing to consider the underlying fairness of the state court proceeding before applying collateral estoppel effect to it.

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[3]. The appellant has also raised the issue of whether an intentional act under § 523(a)(6) requires an "intent to harm" or simply an injury caused by an intentional act. The Court agrees with the recent holding by Judge Sarokin in *Matter of Rowland*, (D.N.J.1988) that "willful and malicious injury" does not require proof of intent to harm. However, while this Court adopts the broader view of what constitutes an intentional act under § 523(a)(6), the Bankruptcy Court should keep in mind on remand that, in the context of the malicious prosecution judgment, a finding that Braen Jr. either negligently or recklessly supplied false information to authorities cannot support a denial of discharge under § 523(a)(6).

Suffice it to say that in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Supreme Court stated that collateral estoppel should not be applied to a judgment if "the application of offensive collateral estoppel would be unfair to a defendant." 439 U.S. at 331, 99 S.Ct. at 652. Moreover, in *Matter of Ross*, 602 F.2d at 608, the Third Circuit stated that a bankruptcy judge should apply collateral estoppel only "after a careful review of the record of the prior case, a hearing at which the parties have the opportunity to offer evidence, and the making of findings of fact and conclusions of law."

In the case at bar, it does not appear that the bankruptcy judge held a hearing or accepted evidence on matters related to the underlying fairness of the state court proceeding. Appellant cites poor health, incompetent counsel and the fact that relevant evidence was not considered, as factors tending to make it unfair for the Bankruptcy Court to apply collateral estoppel effect to the state court judgment. Of these factors, the question of new evidence, in particular, should have been considered by the Bankruptcy Court before applying collateral estoppel. *In re Georgia Granite Co., Inc.*, 86 B.R. 733, 739 (Bkrtcy.N.D.Ga. 1988) ("Newly discovered evidence may preclude application of the collateral

estoppel doctrine if the party against whom collateral estoppel is asserted was deprived of crucial evidence in the prior litigation without fault of his own.").[4]

Therefore, the Bankruptcy Court erred in applying collateral estoppel effect to the state court verdict without first examining the underlying fairness of that proceeding.

III. CONCLUSION

For the reasons set forth above, the decision of the Bankruptcy Court to apply collateral estoppel effect to the state court judgment is reversed, and the case is remanded back to the Bankruptcy Court for further proceedings consistent with this opinion.

An appropriate order is attached.

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[4] The decision by the New Jersey Secretary of Transportation, after a full hearing, to suspend Laganella doing work for the state appears particularly relevant to the question of discharge, even though this decision was not introduced into evidence at the state trial. The Court is also troubled by the apparent failure of the Court to consider the affidavits of Kathy Flicker and Michael Bozza, the state prosecutors who were responsible for bringing charges against Laganella.

UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF NEW JERSEY

ADV. No. 86-0601

OPINION GRANTING SUMMARY JUDGMENT

JUNE 21, 1988

CAPTION OMITTED IN PRINTING

WILLIAM F. TUOHEY, Bankruptcy Judge.

This matter comes before the Court upon a motion for summary judgment filed by plaintiffs, Nicholas Laganella and P.T. & L. Construction Co., Inc., asserting the judgment entered in the state court of New Jersey against the debtor/ defendant is nondischargeable pursuant to Bankruptcy Section 523(a)(6) of the United States Bankruptcy Code. An action raising the dischargeability of a particular debt is a core proceeding pursuant to 28 U.S. Code § 157(b)(2)(I).

The following facts are not in dispute between the parties.

1. On February 25, 1980, plaintiffs herein, Nicholas Laganella and P.T. & L. Construction Co., Inc., filed a complaint in the Superior Court of the State of New Jersey, Law Division, wherein debtor, Samuel Braen, Jr., was one of several defendants.

2. The aforesaid state court complaint stated that sometime prior to 1975 the defendant, Samuel Braen, Jr., did maliciously and without probable cause instigate and proximately caused the plaintiff Laganella to be indicted in certain state criminal proceedings. (State court complaint attached to plaintiff's moving papers as exhibit # 1.)

3. The state court litigation charged the defendant with giving false information to the Division of Criminal Justice of the State of New Jersey that resulted in indictments against Mr. Laganella and the corporate plaintiff. Said indictments were grounded in a bid-rigging conspiracy, and said indictments resulted in the ban of Laganella and P.T. & L. from the rolls of approved contractors for performing any state construction work within the State of New Jersey. It is undisputed that Laganella and P.T. & L. were acquitted of the criminal charges by a jury in 1979.

4. The malicious prosecution complaint was tried in November, 1983, before a jury of six.

5. After the plaintiffs and defendants had presented their case to the jury in the state court proceeding, the trial judge charged the jury solely on the issue of malicious prosecution.

6. After the judge's charge the jury was given special interrogatories by the court. The following is a summary of said jury interrogatories which have been submitted to this Court as exhibit # 3 attached to plaintiff's moving papers:

> 1. Do you find that Plaintiff has proved by a preponderance of the evidence that the named Defendants acted to bring about or were responsible for the institution of underlying criminal proceeding against Plaintiff, Nicholas Laganella?

Answer: As to Sam Braen, Jr., yes.

2. Do you find that Plaintiff has proved by a preponderance of the evidence that there was a lack of reasonable or probable cause for the criminal prosecution?

Answer: As to Samuel Braen, Jr., yes.

3. Do you find that Plaintiff has proved by a preponderance of the evidence that the Defendant/Defendants was/were activated by a malicious motive in prosecuting the criminal complaint against Plaintiff.

Answer: As to Sam Braen, Jr., yes.

* * * * * *

5. Do you find that the Defendant has proved by a preponderance of the evidence that the Defendant/Defendants truthfully communicated to his attorney all of the material facts of the case and then relied upon the advices of his attorney to institute the criminal prosecution against the plaintiff?

Answer: As to Sam Braen, Jr., no.

7. In accordance with the unanimous verdict of the jury rendered in the said state court proceeding, plaintiffs Laganella and P.T. & L. Construction were awarded compensatory damages of $10,000,175.00 and punitive damages of $150,000.00.

8. On March 19,1984, a notice of appeal was filed by the debtor/defendant Braen with the New Jersey Appellate Division.

9. On October 9, 1985, the Appellate Division of the State of New Jersey affirmed the jury verdict in favor of Laganella, et al.

10. On September 8, 1986, a petition for certification filed by Braen was denied by the New Jersey Supreme Court.

11. On October 8, 1986, Samuel Braen Jr. filed a voluntary Chapter 11 bankruptcy petition before this Court.

12. The pending summary judgment motion before the Bankruptcy Court seeks an order directing the debtor/ defendant Samuel Braen, Jr., to pay to plaintiffs the aforesaid judgments with accrued interest totalling $13,773,550.00 plus continuing to accrue interest and costs.

CONCLUSIONS OF LAW

Plaintiffs for their part assert that the debtor is collaterally estopped from seeking to re-litigate the issues of whether the debtor's tortious conduct falls within the parameters of 11 U.S.C. § 523(a)(6) which deals with dischargeability of debts for intentional torts. Defendant/ debtor for his part asserts that the plaintiffs may not invoke

the doctrine of collateral estoppel, because they cannot establish the requisite elements as defined by the Bankruptcy Code and relevant decisional law. In particular, the debtor argues that the state court jury verdict was based on an evidentiary test grounded in the principle of a preponderance of the evidence rather than a clear and convincing test as the debtor would assert is required under the provisions of the Bankruptcy Code. Debtor further states that the state court's jury finding of "malicious motive" differs from the definition of "willful and malicious" as found in the Bankruptcy Code, particularly § 523(a)(6).[1]

The founding fathers at the very inception of our judicial system noted that the integrity of the state judicial systems was to be preserved and protected and that the

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[1] In addition to the above legal arguments centering around the issue of burden of proof, the debtor also asks this Court to review the jury charge at the time of trial and further to take into consideration certain personal health problems of the debtor which it is asserted deprived the debtor of his right to participate fully in the trial proceeding; in addition , debtor attacks the competence of his state trial counsel. All of the aforesaid issues were properly raised in the Appellate Division of the State Court and in Braen's petition to the Supreme Court of New Jersey and should not be considered by this Court. The opinion of the Appellate Division is attached to plaintiff's moving papers. In addition, we note that Braen's petition for certification to the Supreme Court was denied by said appellate tribunal. It is not the function of the Bankruptcy Court to reopen and reexamine the conduct of the trial court. The review of the Bankruptcy Court is limited to those issues arising under the concept of collateral estoppel and those issues flowing from the issue of burden of proof and the applicability of the relevant sections of the United States Bankruptcy Code.

creation of a federal court system was not to override inherent authority of a state judiciary. In this context, Section 34 of the Federal Judiciary Act of September 24, 1789, provides:

> The laws of the several states, except where a constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

While there evolved in the early days of our judicial history a body of federal common law, said concept was expressly overruled in the case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Justice Brandeis, in delivering the opinion of the Court in Erie, noted at page 78, 58 S.Ct. at page 822:

> Except in matters governed by the federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state should be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal, general, common law.

The concept of applying the law of the various states unless the matter is expressly governed by the federal Constitution or an act of Congress has continued down to the present. The more recent case of *Butner v. United States*, 440

U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979) finds the Court stating:

> Property rights are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.

The issue as to the position of the burden of proof in a law suit is a substantive matter not a procedural matter, and the rule of the state forum governs. *Firemen's Fund v. Videfreeze Corp.*, 540 F.2d 1171 (3rd Cir. 1976); *cert. denied* 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977). Congress, through the authority expressly delegated to it in Article 1, Section 8, Paragraph 4 of the United States Constitution, has the right to enact uniform bankruptcy laws. Those laws insofar as they deal with the rights of a debtor and a creditor and regulate the administration of a debtor's estate are paramount and take precedence over conflicting state laws. *Butner v. United States, supra.* However, in the absence of express provisions within the Bankruptcy Code, the bankruptcy courts should look to state law for the regulation of basic property rights. Burden of proof in a bankruptcy proceeding is a matter of substantive law and covered by the general rule that questions of substantive law in connection with the handling and allowance of

claims in a bankruptcy are governed by state law. *Norwalk Tire & Rubber Co.*, 100 F.Supp. 706 (D.C.Conn.1951).

In passing Bankruptcy Code Section 523(a)(6), Congress has mandated certain exceptions to the basic discharge provisions of the Bankruptcy Code. Section 523(a)(6) provides that a discharge does not discharge an individual debtor from any debt arising from willful and malicious injury by the debtor to another entity or the property of another entity.

There is a split in the bankruptcy court decisions arising under the dischargeability sections of the Code, particularly on the issue of the plaintiff's burden of proof. New Jersey, it is agreed by the parties, provides that a malicious prosecution complaint in the state court is controlled by the doctrine that the plaintiff must prove its allegations by a fair preponderance of the evidence. The parties before this Court in the matter *sub judice* concede that that was the burden of proof met by Laganella in the Superior Court of New Jersey, and there is a concomitant line of bankruptcy cases holding that under Bankruptcy Code Section 523(a)(2) the plaintiff/creditor seeking to have its debt held to be nondischargeable has the same fair preponderance of the evidence burden. *Sweet v. Ritter Finance Co.*, 263 F.Supp. 540 (W.D. Va.1967); *In re Carr*, 49

B.R. 208 (Bankr. W.D.Ky.1985); *In re Baiata*, 12 B.R. 813 (Bankr.E.D.N.Y.1981).

However, there is another distinct line of cases which hold that the plaintiff in a nondischargeability action arising under 523 has the burden of demonstrating the actions of the debtor by clear and convincing evidence. *In re Van Horne*, 823 F.2d 1285 (8th Cir.1987); *Bogstad*, 779 F.2d 370 (7th Cir.1985); *In re Martin*, 761 F.2d 1163 (6th Cir.1985); *In re Colasante*, 12 B.R. 635 (E.D.Pa.1981).

Bankruptcy Judge Queenan, in a recent opinion, *In re Daboul*, 85 B.R. 197, 17 B.C.D. 660 (Bankr.1988), had occasion to analyze the aforesaid split in the bankruptcy court decisions. As Judge Queenan noted and as further noted by this Court's research, only one court of appeals has decided the issue of the burden of proof in a nondischargeability format involving issue preclusion where a delineation of the burden of proof is crucial. *Daboul, supra*, 85 B.R. 197, 17 B.C.D. at 662. In that decision, *Combs v. Richardson*, 838 F.2d 112 (4th Cir.1988), the Fourth Circuit came down on the side of preponderance of the evidence as opposed to clear and convincing. In *Combs, supra*, the Fourth Circuit expressly noted:

> The Bankruptcy Code is silent as to the standard of proof necessary to establish the

> exceptions to discharge in § 523. In the face of this silence, courts may not imply a higher standard than the preponderance standard normally applied in civil proceedings. 838 F.2d at 116.

Thus, the *Combs* Court has found that there is a complete absence in the Bankruptcy Code of any standard of proof dealing with nondischargeability. The Fourth Circuit concluded from this that we should then look to state law. Said logic is certainly in conformance with the long standing procedures commencing in *Erie v. Tompkins, supra*, and running through *Butner v. United States, supra*.

The doctrine of collateral estoppel applies in the bankruptcy court. *Matter of Ross*, 602 F.2d 604 (3rd Cir. 1979). The Third Circuit in *Ross, supra*, has set forth the criteria which must be satisfied in order for the doctrine of collateral estoppel to apply:

> 1. The issues sought to be precluded from a second trial must be the same as that involved in the prior action;
> 2. the issue must have been actually litigated in the first proceeding;
> 3. the issue must have been determined by a valid and final judgment; and
> 4. the determination at issue must have been essential to the judgment in the first proceeding.

Ross, supra, at 607, 608.

It is noted that the Third Circuit decision in *Ross, supra,* is based upon the United States Supreme Court decision in *Brown v. Felsen,* 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). Specifically, the *Felsen* Court held at 99 S.Ct. 2213, n. 10:

> If, in the course of adjudicating a state law question, a state court should determine factual issues using standards identical to those of § 17 [of the Bankruptcy Act now Section 523], then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court.

The state court action involving the parties before this Court arose from a complaint asserting the tort of malicious prosecution. One of the essential elements of the tort of malicious prosecution in the State of New Jersey is a malicious act with resultant damage. *Mayflower Industries v. Thor Corp.,* 15 N.J.Super. 139, 83 A.2d 246 (Ch.Div.1951), *affirmed,* 9 N.J. 605, 89 A.2d 242 (1952).

The trial judge in *Mayflower, supra,* was then state court Judge Francis (future Supreme Court Justice Francis). The term malice is defined by the *Mayflower* trial court as follows:

> Malice in this connection means the intentional commission of a wrongful act without just cause or excuse.

Mayflower, supra, 15 N.J.Super. at 152, 83 A.2d 246.

I find that Laganella, as the plaintiff in the superior court action tried to conclusion in the State of New Jersey, had the burden of establishing the tort of malicious prosecution as outlined in the case of *Mayflower Industries v. Thor Corp., supra,* and that said tort comports with the definition in the United States Bankruptcy Code as set forth in Section 523(a)(6) which defines certain actions as nondischargeable actions. In summary, the same issue was tried to conclusion by a court of competent jurisdiction based upon the same statutory definition and the same burden of proof that is before this Court. Hence, this Court, under the doctrine of collateral estoppel as defined *In the Matter of Ross,* 602 F.2d 604 (3rd Cir.1979) should enforce the prior judgment of the state courts of New Jersey.

Summary judgment procedure is a method for properly disposing of actions in which there is no genuine issue as to any material fact. Summary judgment is provided for in Federal Rule of Civil Procedure 56. Bankruptcy Rule 7056 specifically provides that F.R.C.P. 56 applies in adversary proceedings in bankruptcy. The test in applying the motion is whether the pleadings, depositions, interrogatories and affidavits submitted show that there is no genuine issue as to

any material fact, and that the moving party is entitled to a judgment as a matter of law. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67, 110 A.2d 24 (1954); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Based upon this Court's review of the record presented in support of and in opposition to the motion for summary judgment, this Court concludes that there is no remaining dispute as to any genuine issue between the parties based upon the doctrine of collateral estoppel. The debtor herein had a full trial over several weeks in the Superior Court of New Jersey and has exhausted his appeals to the Appellate Division and the Supreme Court of the State of New Jersey. Said exhaustive legal battle centered on the question as to whether the debtor had acted willfully and maliciously toward the plaintiff herein. Said issue having been resolved, the debtor cannot not now obtain a second trial within the context of this bankruptcy proceeding. Summary judgment is granted in favor of the plaintiff, the judgment entered in favor of Nicholas Lagonella and P.T. & L. Construction Co., Inc. in the Superior Court of the State of New Jersey is nondischargeable pursuant to Bankruptcy Code Section 523(a)(6).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5185

IN RE: SAMUEL BRAEN, JR.,
Debtor

NICHOLAS LAGANELLA AND PT&L CONSTRUCTION CO, INC.
Appellants

SUR PETTTION FOR REHEARING

BEFORE: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPELTON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, AND NYGAARD, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/
Circuit Judge

Dated: Apr. 27, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5185

IN RE: SAMUEL BRAEN, JR.,
Debtor

NICHOLAS LAGANELLA AND PT&L CONSTRUCTION CO, INC.
Appellants

(D.C. Civil No. 88-3473)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ---- DISTRICT OF NEW JERSEY (Newark)

Present: HIGGINBOTHAM, *Chief Judge*,
STAPELTON and SCIRICA, *Circuit Judges*

JUDGEMENT

This cause came on to be heard on the record from the United States District Court for the ---- District of New Jersey (Newark) and was argued by counsel September 29, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 21, 1989, be, and the same is hereby reversed and the cause remanded to the said District Court with instruction to reinstate the bankruptcy court's June 21, 1989 order. Costs taxed against the appellee. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/
Clerk

March 30, 1990

COURT OF APPEALS FOR THE THIRD CIRCUIT
#A-75

Misc. No. 89-8004
In re: Samel Braen Jr., Debtor
Nicholas Laganella et al.
vs.
Samuel Braen, Jr.
Nicholas Laganella and P.T.&L. Construction Co., Inc., Petitioners
(Newark NJ D.C. Civil No. 88-3473)

Present: SEITZ AND GREENBERG, Circuit Judges.
Petition for permission to appeal pursuant to 28 U.S.C. §1292 (b) and Rule 5 of the F.R.A.P.

Certificate entered 1-17-89 — 10 days to file petition in Court of Appeals (see Exhibit B)

ORDER

The foregoing Motion is granted.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re Case No. 86-06241DV	:	
	:	
SAMUEL BRAEN, JR.,	:	Civil Action
	:	No. 88-3473
Debtor,	:	
	:	Formerly
	:	Adversary No.
NICHOLAS LAGANELLA and	:	86-0601C
P.T. & L. CONSTRUCTION	:	
CO.,INC.,	:	
	:	
Plaintiff-	:	
Appellees,	:	
	:	
v.	:	**ORDER**
SAMUEL BRAEN, JR.	:	
	:	
Defendant-	:	
Appellant.	:	

This matter having been opened to the Court by Klein, Chapman, Greenburg, Henkoff & Siegel, attorneys for plaintiff-appellees, on plaintiff-appellees' motion pursuant to 28 U.S.C. 1292 (b), upon notice to Podvey, Sachs, Meanor & Catenacci, attorneys for defendant-appellant, and the Court having considered the papers submitted in support of, and in opposition to the motion, and good cause having been shown,

It is on this 12th day of January, 1989,

ORDERED that this Court's Order of November 18, 1988, is amended so as to include a statement, pursuant to 28 U.S.C. § 1292 (b), that a controlling question of law is at issue as to which there is a substantial ground for a difference or opinion,

the resolution of which will materially advance the ultimate termination of the litigation. Specifically, the Court finds that the questions of: (1) the standard of proof in a dischargeability case under Section 523 (a) (6) of the United States Bankruptcy Code; (2) whether the tort of malicious prosecution, as defined under New Jersey law, qualifies as a willful and malicious injury under Section 523 (a) (6) of the United States Bankruptcy Code; and (3) if the Bankruptcy Court erred by not considering the underlying fairness of the state court proceeding before applying collateral estoppel effect to it, are issues as to which there is a substantial ground for difference of opinion, and, because the case concerns the applicability of collateral estoppel, resolution of these legal issues will materially advance the ultimate termination of the litigation.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re Case No. 86-06241DV	:	
	:	
SAMUEL BRAEN, JR.,	:	Civil Action
	:	No.87-3473
Debtor,	:	
	:	Formerly
		Adversary No.
NICHOLAS LAGANELLA and	:	86-0601C
P.T. & L. CONSTRUCTION	:	
CO.,INC.,	:	
	:	
	:	
Plaintiff-	:	
Appellees,	:	
	:	
v.	:	**ORDER**
	:	
SAMUEL BRAEN, JR.,	:	
	:	
Defendant-	:	
Appellant.	:	

This matter having been opened to the Court by Podvey, Sachs, Meanor & Catanacci, attorneys for defendant-appellant Samuel Braen, Jr., appealing the decision of the Bankruptcy Court, on notice to Klein, Chapman, Greenburg, Henkoff & Siegel, attorneys for plaintiff-appellees, and the Court having considered the papers submitted in support of, and in opposition to appeal, and having heard the argument of counsel, and for the reasons set forth in the Court's opinion, and good cause having been shown;

It is on this 18 day of November, 1988.

ORDERED that the decision of the Bankruptcy Court is reversed and the case is remanded to the Bankruptcy Court for further proceedings consistent with this Court's opinion.

/s/
Alfred Wolin,
U.S.D.J.

11-18-88

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:		
Samuel Braen, Jr.,	:	
Debtor	:	Case No. 86-06241
_____	:	
Nicholas Laganella and P.T. & L. Construction Co., Inc.,	:	
Plaintiffs	:	
vs.	:	Adversary No. 86-0601
Samuel Braen, Jr.,	:	
Defendant.	:	
_____	:	JUDGMENT

This matter having come before the court based upon plaintiff's motion for summary judgment; and the Court having this date rendered its findings of fact and conclusions of law in a written opinion;

IT IS, on this 21st day of June, 1988;

ORDERED, that the judgment entered in the Superior Court of the State of New Jersey in favor of Nicholas Laganella and P.T. & L. Construction Co., Inc. and against Samuel Braen, Jr. be and the same hereby is nondischargeable in the bankruptcy proceeding pending before this court.

/s/

William F. Tuhoey
Bankruptcy Judge

PODVEY, SACHS, MEANOR & CATENACCI
A Professional Corportion
One Gateway Center
Newark, New Jersey 07102
(201) 622-4702

In re Case No. 86-06241DV

SAMUEL BRAEN, JR.,

Debtor,

NICHOLAS LAGANELLA and
P.T. & L. CONSTRUCTION CO.,
INC.,

Plaintiffs,

vs.

SAMUEL BRAEN, JR.

Defendant.

AFFIDAVIT OF KATHY FLICKER, ESQ.

STATE OF NEW JERSEY:

SS

COUNTY OF MERCER :

Kathy Flicker, of full age and having been duly sworn according to law, upon her oath deposes and says:

1. I am an attorney at law of the State of New Jersey, and make this affidavit in opposition to plaintiff, Nicholas Laganella's motion for summary judgment in the above-referenced matter. I am fully familiar with the facts contained herein.

2. In the mid 1970's, I was a Deputy Attorney General for the State of New Jersey. During 1974, while I was with the Attorney General's office, Samuel Braen, Jr., the defendant in the above-captioned matter, gave information to the Attorney General's office regarding multiple instances of illegal behavior in connection with road building in northern New Jersey. Braen, Jr., himself, had been indicted in the fall of 1972 for shortweighting of asphalt during the paving of the Palisades Interstate Parkway.

3. Braen, Jr. provided the Attorney General's office with what proved to be significant information, which resulted in the indictment of numerous people, including former Secretary of the State of New Jersey, Edward Crabiel, as well as Passaic County freeholders, public officials in Little Ferry, and the plaintiff in this matter, Nicholas Laganella.

4. Braen Jr. testified before the Grand Jury in January of 1974 with regard to various matters, including Nicholas Laganella and P.T.&L. Construction Company. I understand

that transcripts of Braen, Jr.'s and others' testimony is being provided to the Court in connection with this motion.

5. Braen, Jr.'s information constituted only a part of the substantial evidence of Laganella's and P.T.&L.'s involvement in this bid rigging scheme. In addition to Braen, Jr.'s information, information was received from Harry Evans, a Braen Company Vice President who had actually negotiated the bid rigging scheme with Laganella. In addition, there were promissory notes that were issued by Laganella in consideration for the rigged bid, and fictitious bills submitted by Braen, Sr.'s company to Laganella against which these promissory notes were retired.

6. Other individuals also provided information regarding the bid rigging. Patrick W. Reardon, stated that invoices submitted by Samuel Braen Company to P.T.& L. were fictitious. James A. Mion, the former controller of P.T. & L., testified at the first trial that he was responsible for making necessary entries into various journals with regard to promissory notes. Mion further testified that he never saw the promissory notes issued to Sam Braen Construction Company until they had been shown to him by the New Jersey Attorney General's office.

7. While Samuel Braen, Jr. was first person to bring

this episode to Attorney General's attention, Braen did not, in any way, push for the indictment of Laganella. Rather, based upon investigation prior to the Grand Jury presentment, the Attorney General's office, itself, decided to pursue Laganella's indictment.

8. Based upon my experience as an Attorney General, as well as my current experience as a Mercer County prosecutor, I believe that there was more than sufficient probable cause for bringing such indictment.

9. As a matter of practice within the Attorney General's office, I had the authority to recommend non-prosecution if it appeared to me that there was not probable cause. I never considered such a recommendation, nor would I because I believe that there was probable cause to try Laganella.

10. Following Laganella's indictment, I became personally responsible for bringing his indictment to trial. With the assistance of an investigator named Bobby Jordan, who is now deceased, I continued the investigation of Laganella, interviewing numerous people, and reviewing all of the evidence that was available.

11. In the course of my preparation, I had contact with Sam Braen, Jr. I had less contact with Braen, Jr. than with Harry Evans. The reason for this is because Braen, Jr.

was a less significant participant in this matter, and because of his physical illness. Rather, I worked more closely with Harry Evans, Jr., who had personal knowledge of the bid-rigging scheme.

12. I understand that in the civil malicious prosecution trial of Sam Braen, Jr., it was alleged that he and Evans conspired to frame Laganella. I do not believe that this is likely. Evans and Braen, Jr. each strongly disliked the other, and it was very very difficult to get both of them together in the same room.

13. My investigation of this matter for trial further convinced me that there was probable cause to charge Nicholas Laganella with the offenses for which he was to stand trial.

14. Laganella's trial commenced in April of 1975. This trial was continued through the completion of the State's case. After the State rested, the attorney for the defendant made an application to dismiss for failure to present a prima facie case. Following argument on that application, the Court concluded that such a prima facie case had been presented, and denied the defendant's motion. The Court did, however, dismiss the State's case on procedural grounds. Such dismissal was, however, appealed and reversed

and Laganella was eventually retired, and acquitted.

15. I was not involved in the second trial, and I do not know the reason why the acquittal occurred.

16. After Laganella was acquitted at his second trial, he brought suit against me, John Sheehy, Esq., (who had handled the second trial), and Richard L. Rudin, Esq. (who had handled Laganella's and P.T.&L.'s public bidding debarment). To the best of my recollection, after this matter was dismissed on summary judgment, Laganella filed the matter again in a different Court, and the matter was dismissed again.

17. Because of my extensive preparation for the first Laganella trial, I believe that I am more knowledgeable about this matter than any current or former member of the Attorney General's office. Despite this fact, I was never consulted with regard to the defense of Samuel Braen, Jr. at the malicious prosecution action initiated by Laganella. I first learned about this action when I received a phone call from Harry Evans, who called me when he was first served with this Complaint. I told Harry Evans to have his attorneys call me, but I never heard from them until the trial was already in progress.

18. While the civil trial was in progress, my office

received a phone call from the attorneys representing Samuel Braen, Jr. Because I was on trial myself I was unable to speak with that attorney at the time and I subsequently called back and urged that attorney to come and talk with me. I was never, however, contacted again. I would have been happy to have testified on Samuel Braen, Jr.'s behalf, if asked, and I would have testified that the decision to prosecute Nicholas Laganella was made by the Attorney General's office, and was not urged by Samuel Braen, Jr. I would have further testified that I believe there was sufficient probable cause to proceed with this matter at every step of the prosecution. Finally, I would have testified, if asked, that I did not believe that Samuel Braen, Jr. Harry Evans, or anyone else intentionally, maliciously, recklessly, or negligently, pursued this action against Nicholas Laganella and P.T.&L.

19. Based upon my extensive involvement in this investigation, I am aware that the State's file contains a large amount of proof that the indictment was pursued by the Attorney General's office and not by Samuel Braen, Jr. In addition, the file contains substantial evidence of probable cause for Laganella's prosecution. In particular, a hearing was conducted before the Honorable Leon Gerofsky, a State Department of Transportation hearing examiner who de-

termined that Laganella and P.T.&L should not be removed from the debarred bidders list which they had been placed upon following Laganella's indictment. This opinion which was based upon the hearing examiner's review of the first trial, as well as direct testimony by Laganella himself, establishes probable cause to believe that Laganella and P.T. & L. committed the underlying acts of bid-rigging.

20. To my knowledge, the attorneys for Samuel Braen, Jr. never requested nor reviewed these files.

The above statements made by me are true and based upon personal knowledge except where otherwise noted. I am aware that if any statement made by me is false I am subject to punishment.

/s/

Kathy Flicker

Sworn to and subscribed
before me this 30th day
of March, 1988.

/s/

PODVEY, SACHS, MEANOR & CATENACCI
A Professional Corporation
One Gateway Center
Newark, New Jersey 07102
(201) 622 4702

In re case No. 86-06241DV :
:
SAMUEL BRAEN, JR., :
:
Debtor, :
:
NICHOLAS LAGANELLA and :
P.T. & L. CONSTRUCTION CO., :
INC., :
:
Plaintiffs, :
:
vs. :
SAMUEL BRAEN, JR. :
:
Defendant. :

AFFIDAVIT OF MICHAEL BOZZA, ESQ.

STATE OF NEW JERSEY:
SS
COUNTY OF MERCER :

Michael Bozza, of full age and having been duly sworn according to law, upon his oath deposes and says:

1. I am an Assistant Attorney General of the State of New Jersey, and make this affidavit in opposition to a motion

for summary judgment filed by Nicholas Laganella and P.T.&L. Construction Company. I am fully familiar with the facts set forth herein.

2. During the early 1970's I was responsible for the indictment of Samuel Braen, Jr. in connection with a shortweighting scheme at the Palisades Interstate Parkway.

3. At the time that Braen, Jr. was indicted he suffered from very severe health problems. As a result of the failure of his kidneys, he was on dialysis, and I did not believe it likely that he would be capable of standing trial because of his health.

4. Because of this fact, as well as my suspicions about Braen, Jr.'s knowledge of wrongdoing in the road construction business, I made substantial efforts to put pressure on Braen, Jr. to cooperate with the Attorney General's office and provide information about other individuals who might be tried and convicted.

5. Braen, Jr. resisted such efforts for a long period of time, but finally consented to provide information. An agreement was reached whereby if Braen was cooperative with the State and provided truthful information he would not be prosecuted, and the State would move to dismiss his indictment and reinstate his father's company to public

bidder status.

6. As a part of this agreement, I interviewed Braen, Jr. with regard to illegal practices in the road construction business in northern New Jersey. Braen, Jr. provided a substantial amount of accurate information which led to a number of indictments and the conviction of various public officials.

7. A small portion of the information Braen, Jr. provided concerned a bid rigging scheme involving P.T.&L. and Nicholas Laganella. According to Braen, Jr. Laganella had entered into an agreement whereby Harry Evans, who was then Vice President of Braen, Jr.'s father's business, would submit a knowingly high bid so that Laganella would be declared the low bidder on a state highway project. In return for this high bid, Laganella agreed to pay Braen Sr.'s company $185,000.00.

8. As a result of this information, the Attorney General's office began an investigation which eventually led to the indictment and trial of Nicholas Laganella. The indictment came about as a result of independent corroboration of Braen, Jr.'s initial story through various other sources, including the testimony of Harry Evans, and that of P.T.&L.'s former bookkeeper.

9. During the period that I worked with Braen, Jr., I did not receive the impression that he was out to "get" anyone. Rather, I believe he was cooperating because of the situation in which he found himself.

10. Based upon the evidence uncovered, I believe that there was strong probable cause to bring an indictment against Nicholas Laganella. As a general practice, the State will not bring an indictment on the uncorroborated statement of an accomplice such as Braen, Jr. While Braen, Jr. provided us with the initial information about Laganella's offense, Braen, Jr.'s testimony was mostly hearsay, and could not, by itself, support an indictment or a conviction. Accordingly, other sources were developed which allowed us to prepare a prima facie case against Laganella.

11. Nicholas Laganella was tried twice for bid-rigging. The first trial was dismissed at the close of the State's case. On appeal that dismissal was reversed, and the matter was remanded for a second trial in which Laganella was acquitted.

12. Following his acquittal, Laganella and P.T. & L. filed suit against Braen, Jr., Braen, Sr., and Harry Evans. Before trial I received one or two phone calls from Ron Rosensweig, the attorney for Sam Braen, Jr. These conver-

sations were short, and I recall that I recommended that Rosensweig speak with Kathy Flicker, Esq. who was more familiar with this matter because of her involvement in trying the first Laganella case. To the best of my knowledge, Kathy Flicker was never contacted prior to the trial by Braen, Jr.'s attorneys.

13. Contained within the State files is a substantial amount of material which illustrates the process by which Laganella was indicted. Attorneys for Laganella subpoenaed these records. The Attorney General's office initially resisted the production of such files by bringing a motion for a protective order. Such motion was denied in large part, and much of this file was made available to Laganella's attorneys.

14. During my brief conversations with Rosensweig, I told him that attorneys for Laganella had seen this file, and that it was available for Rosensweig's inspection. Rosensweig, however, never came down to view this file.

15. I was called as a witness at the malicious prosecution trial by both Laganella and Braen, Jr. Rosensweig did not make any efforts to interview me before putting me on the stand. Rather, when it became apparent to me that he was going to call me as a witness without having even spoken to me about my testimony, I approached him in the hallway at

the Courthouse and spoke to him briefly.

16. During the course of phone calls and my conversation in the hallway with him, Rosensweig voiced his opinion to me that the case was frivolous and that it would never reach a jury.

The above statement made by me is true and based upon personal knowledge except where otherwise noted. I am aware that if any statement made by me is willfully false I am subject to punishment.

/s/

Michael Bozza

Sworn to and subscribed
before me this 7 day
of April, 1988.

/s/

An Attorney at Law of New Jersey

November 10, 1975

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

IN THE MATTER OF THE APPLICATION OF:	)	Hearing Examiner's Report
P.T.&L. CONSTRUCTION COMPANY, INC.	)	

On December 27, 1974, the Commissioner of the New Jersey Department of Transportation (hereafter DOT) notified P.T. & L. Construction Co., Inc., (hereafter P.T. & L.) and its President, Nicholas Laganella, that the classification of P.T. & L. to transact business with the DOT as a highway contractor was being suspended on the ground that there had been a development subsequent to the classification of P.T. & L. that adversely affected the responsibility of the contractor to bid on DOT projects. N.J.S.A. 27:7-35.8. The suspension was extended to preclude P.T.&L., not only from bidding on any contract with the DOT, but also from being a subcontractor or materialman on any such contract, or from being a contractor, a subcontractor or materialman on any local aid projects using DOT funds.

The development which had prompted the suspen-

sion was the indictment of P.T.&L. and Laganella on November 7, 1974 on one count of conspiracy to subvert the State's bidding laws, i.e., N.J.S.A. 2A:98-1 (h) and N.J.S.A. 2A:98-2, by conspiring with Samuel Braen, Sr., Samuel Braen, Jr., Samuel Braen Construction Company and Braen Industries, Inc., so that the Braen Construction Company would submit a higher bid on a contract for Route 23, Sections 6A and 5B, than a bid to be submitted by P.T.&L. in return for a $180,000 payment from Nicholas Laganella.[1]

The indictment generally shows that P.T.&L. was awarded the contract at its low bid of $6,842,960.65 and that Braen Construction Company submitted a higher bid of $6,941,508. Laganella also filed an Affidavit of Non-Collusion with P.T.&L.'s bid. On April 20, 1968, Nicholas Laganella transmitted a series of promissory notes payable to the Braen Construction Company memorializing the consideration previously agreed upon. On several subsequent dates, employees of the Braen firms transmitted bogus invoices to P.T.&L., purporting to reflect the sale of materials by Braen Industries, Inc. to P.T.&L., in response to which Laganella periodically transmitted checks of P.T.&L. to Braen Indus-

[1] The $180,000 consideration for the collusive bidding arrangement set forth in the indictment was inaccurate; actually, the trial testimony indicates that the amount was $185,000

tries, Inc. as partial payment of the aggregate balance due on the fictitious invoices.

The allegations of the indictment formed a sufficient basis for the Commissioner to question the responsibility of P.T.& L. to transact business with the DOT and accordingly to suspend P.T.&L.'s classification. *Trap Rock Industries, Inc. v. Kohl*, 59 N.J. 471(1971). The Supreme Court of New Jersey in *Trap Rock* had stated that the term "responsibility" included "moral integrity," and certainly the above indictment, which goes to the very foundation of the competitive bidding system, raised serious questions about P.T. & L.'s integrity.

In the notice of suspension P.T. & L. was afforded an opportunity for a hearing to explain the charge against it. Apparently, the contractor delayed its request for a hearing until June 23, 1975 because of the pendency of the criminal proceedings. The hearing was held at the DOT September 11 and 24, 1975.

The hearing presented P.T. & L. with an opportunity to disclose its theory of the case for the first time, inasmuch as the trial judge in the criminal proceedings dismissed the indictment after the prosecutor completed his case on grounds wholly unrelated to the substantive evidence

presented against P.T. & L. and Laganella.[2]

The transcripts of, and documentary evidence introduced at, the criminal proceedings against P.T. & L. and Laganella were introduced as exhibits in the present administrative proceeding and were considered by me together with the additional testimony and exhibits offered here.

THE CRIMINAL PROCEEDINGS

At the criminal trial, the principal witness against P.T. & L. was Harry Evans, the Vice-President and General Manager of the Braen Construction Company in 1968. Evans testified that approximately one to two weeks prior to the opening of bids on February 8, 1968, he received a phone call from Laganella, who inquired as to whether or not Evans was planning to bid on the Route 23 contract. At that time Evans planned to bid competitively on the project but a few days later he was instructed by Samuel Braen, Sr., the President of the Braen Construction Company to meet with Laganella to discuss an arrangement for bidding. On Mon-

[2] Actually, the trial judge denied a motion by the defense for acquittal, holding that the prosecution established a *prima facie* case. Subsequently, the trial judge was of the opinion that the prosecution had acted negligently by deciding not to produce Samuel Braen, Jr., as a prosecution witness, after first indicating that it would do so, then, in compliance with the court's entreaty, offering to call Braen, Jr., and finally by not disclosing the existence of a tape recording of a statement made by Braen, Jr., even though the defense had obtained a copy of the tape from other sources.

day of the week of the bid-opening (February 5, 1968), Evans and Samuel Braen, Jr., met with Laganella at P.T. & L.'s offices in Paramus to see if they could "get together" or "work something out" to the advantage of both firms. Laganella desired that Evans not bid competitively and stated his belief that no other firm beside P.T. & L. and Braen would bid the project.[3]

No definite agreement was made at this meeting but after Evans discussed Laganella's proposal with Braen, Sr., he called Laganella to accept the proposal. After further telephone discussions, Evans agreed to submit a complimentary bid to insure that P.T. & L. would be low bidder in return for consideration of $185,000. Evans testified that he and Laganella negotiated the $185,000 amount by taking 25-30% of P.T. & L.'s estimated 10% profit on the approximately 7 million dollar contract.

Evans testified that on the night of February 7, 1968, Laganella called him at his office, according to a prior understanding, at which time Laganella disclosed the major items and total or "bottom line" of the P.T. & L. bid. On

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[3] According to Evans, Braen, Jr., was not an active participant at this meeting other than being an emissary for Braen, Sr. The transcript of Braen, Jr.'s testimony before the Grand Jury, offered at the hearing by P.T.&L., however, corroborates the discussion between Evans and Laganella about the collusive bidding.

February 8, 1968, Evans submitted a bid higher than P.T. & L. in accordance with the complimentary bid arrangement. P.T. & L. and Braen were the only firms submitting bids. Both Laganella and Evans submitted affidavits of non-collusion.

About six weeks after the contract was awarded, Evans, at the insistence of Braen, Sr., called Laganella and demanded something in writing to memorialize the agreement. Laganella gave to Evans 33 handwritten promissory notes totaling $185,000 (32 notes at $5,000 and 1 at $25,000). The notes were endorsed both by the corporation and by Laganella personally.

Evans also referred to the Braen bid book, which was the compilation of all the work done in preparation of the bid submitted on the Route 23 project. Evans showed that the items relating to the bridge portion of the contract (Items 118 through 167) listed in the Braen work-up material were identical to the items actually bid in the P.T. & L. final bid. In his testimony, Evans indicated he did not recall specifically giving P.T. & L. the bridge prices; however, he indicated most emphatically that once he agreed to collude with the defendant, Laganella, he would have no misgivings about giving him the bridge prices. The prices that Braen was

utilizing for the bridge items had come from Diversified Bridge and Tunnel Corporation with whom the Braens had subcontracted for the bridge work. A note in the Braen bid book revealed that P.T. & L. had also contacted Diversified, which had refused to give P.T. & L. a quotation for the bridge prices.

Evans testified that once he had possession of the promissory notes, he and Laganella agreed on the manner in which these notes would be paid off. Evans sent phony invoices on Braen Industries, Inc. letterheads, billing P.T. & L. for nonexistent equipment rental. The monies were to be paid off over the course of the Route 23 project. As P.T. & L. paid these phony invoices, an appropriate dollar amount of promissory notes would be returned. As of the time Evans left the Braen Construction Company in February, 1969, approximately $20,000 worth of phony invoices had been paid by P.T. & L., and $20,000 worth of promissory notes had been returned to Nicholas Laganella.

Evans testified that Braen Construction Company had no prior history of doing bridge work either on its own behalf or as a subcontractor. Evans also stated that he deviated from his usual procedure the night before the bid-opening, because of the anticipated call from Laganella, by

not having dinner with and discussing changes which he made in the bid with his chief estimator, LeTourneau. The latter corroborated this unusual departure from procedure by Evans. LeTourneau also testified that he strenuously urged Evans not to sign the affidavit of non-collusion. LeTourneau indicated that he was unhappy with Evans making changes in the prices prepared by LeTourneau in the bid book because he didn't need the experience of doing all the work for nothing.

LeTourneau testified that he received the bridge prices from Diversified by letter dated February 7, 1968, and that prior thereto he had no knowledge of those prices.

LeTourneau indicated that Braen had no history of doing bridge work and he had no knowledge of any agreement by Braen or Evans to do bridge work as a subcontractor for P.T.&L. He also described how it was possible for a contractor to determine in advance the number of bidders on a project by calling up the general or prime contractors that had taken out plans and also the material suppliers that call on the different contractors.

The balance of the State's witnesses were presented to corroborate the phony invoices sent after Evans left the company. The invoices with the letterhead of Braen Indus-

tries, Inc., were padded and reflected material actually purchased by P.T.&L. from the Braen materials division, in addition to nonexistent material. During the course of the contract for the Route 23 project, P.T.&L. paid $150,000 on the phony invoices with checks signed by Laganella.

THE ADMINISTRATIVE HEARING

As noted, the administrative hearing presented P.T.&L. with an opportunity to reveal its theory of the case for the first time. Spinning a fine web of an argument, Laganella described his encounters with Evans and the Braens as being entirely consistent with a lawful transaction.

Laganella testified that about two weeks prior to the opening of bids, he had a chance meeting with Braen, Sr., on a "golf course" in North Jersey [presumably this encounter took place in the clubhouse given the time of year]. At this meeting, Laganella expressed his interest in the Route 23 contract, noted that he was having difficulty obtaining bridge prices, and asked Braen to act as P.T.&L.'s bridge subcontractor if P.T.&L. were the successful bidder. Braen, Sr. manifested an interest in being the bridge subcontractor as long as he also was given the asphalt work. The two men signified their agreement to this division of responsibility

with Braen, Sr., stating that he would direct Harry Evans to contact Laganella.

According to Laganella his subsequent conference with Evans and Braen, Jr. at P.T.&L.'s offices in Paramus and his subsequent telephone discussions with Evans were incidental to this agreement by Braen to do the bridge and asphalt work for P.T.&L. and related to the division of responsibilities on the project. Laganella stressed that two or three days prior to February 8, 1968 he visited Evans at the Braen Construction Company's offices and picked up a pre-bid worksheet containing the bridge prices of Braen. Laganella tried to show that the extensions of the unit prices for the bridge work on this pre-bid worksheet were in Evans' handwriting by comparison with Evans' handwriting in the Braen bid book.[5] Laganella also referred to the note in the Braen bid book that P.T.&L. had unsuccessfully tried to get bridge prices from Diversified, which, together with the bridge prices in the pre-bid worksheet that he stated was given to him by Evans, demonstrated the legality of the transaction as an agreement for Braen to act as P.T.&L.'s bridge subcontractor. Except for minor variations, P.T.&L. used Braen's bridge prices in its bid.

[5] P.T.&L. presented no expert handwriting analysis but argued that the number "5" on the pre-bid worksheet was identical with the number "5" written by Evans in the Braen bid books.

Laganella conceded that he called Evans the night before the bid opening but that the conversation was limited to Laganella's unsuccessful attempt to persuade Evans to reduce his asphalt prices.

On February 8, 1968, Laganella sent his brother, Anthony Laganella, and an employee, Tom Cardulla, to the NJDOT to place a bid. Anthony Laganella testified that this was the only time he went to a bid opening. He also testified that after Tom Cardulla placed a call to Nicholas Laganella, Item #3 designated as construction layout was reduced by $59,000 and the "bottom line" was accordingly reduced from $6,901.716.65 to $6,842,716.65. The reduction was made, according to Nicholas Laganella, because he believed Braen's asphalt prices were too high and jeopardized a possible low bid. The item "construction layout" was chosen for the $59,000 reduction because it was the "slowest money coming in."[6] P.T. & L. urges that this $59,000 reduction is inconsistent with a complimentary bid scheme.

Laganella continued his testimony in order to explain the 33 notes, invoices and checks. Laganella did not contest the fact that the invoices mentioned by Evans and the others were bogus. However, Laganella stated that about two

[6] By referring to the Braen bid book to refresh his recollection, Evans had testified that the "bottom line" he had received from Laganella the night before the bid opening was approximately $6,899,000.

months after P.T. & L. was the lower bidder, he received an unsolicited bid from Bob Lang of Tri-Country Asphalt to do the bridge work for P.T. & L. for $350,000 less than Braen. Laganella testified that prior to the bid opening, Bob Lang would not give P.T. & L. bridge prices since Tri-Country was desirous of bidding as a general contractor; therefore, Lang only gave P.T. & L. asphalt prices prior to the bid opening . But inasmuch as Tri-Country did not place a bid on the Route 23 project, it was now desirous of doing the bridge work for P.T. & L.

Laganella testified that he was desirous of benefiting by Tri-Country's unsolicited bid; however, inasmuch as P.T. & L. was then defending the law suit *Lascon v. P.T. & L. Construction Company*, in which Lascon sued P.T. & L. for breach of an alleged oral contract prior to a bid opening to permit Lascon to do work for P.T. & L. as a subcontractor on another contract, in consideration of Lascon having given P.T. & L. its prices, Laganella was fearful that Braen would also sue P.T. & L. if Tri-Country were substituted as bridge subcontractor. Laganella stated that he was represented by counsel in the Lascon matter at this time, and he recalls that his attorney advised him to settle his potential liability to Braen. Hence, the figure of $185,000 was negotiated by

Laganella, which was approximately one-half the difference ($350,000) between Tri-Country and Braen's bids for the bridge work.[7]

On April 20, 1968, Laganella gave the 33 notes to Braen as an indicia of the $185,000 settlement. Laganella explained that the notes were paid in two ways: first, P.T. & L. let Braen use P.T. & L. equipment without charge; second, P.T. & L. paid a portion of the $150,000 by check. Laganella argued that the Braen organization submitted false invoices to P.T. & L. in an apparent attempt to create an expense on the Braen books for tax purposes. P.T. & L. kept records of the equipment rentals in its ledger accounts.

In return for this "settlement" of a potential damage claim, P.T. & L. received no release or convenant not to sue. Laganella conceded that the invoices were bogus. He articulated that the manner of payment demanded by Braen was of no concern to him. Laganella felt he needed no written documentation aside from the 33 notes, bogus invoices and checks, stating:

> "...I felt I didn't need, you know, at that time I trusted him and he [Braen, Jr.] trusted me. You know, we are not loggerheads as such. We're doing business as gentlemen with each other."

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[7] The bridge work was approximately 1.3 million out of the approximately 7 million dollar contract.

And in response to the payment by bogus invoices from Braen Industries, Inc. during the course of Route 23 project, Laganella stated:

> "Sam Braen wanted me to pay different companies for his own reasons. At first, I objected to this and then after thinking it over in my mind, it didn't affect P.T. & L. at all what company I paid. If I owe company A, B or C money, if I paid company A instead-of paying company B, as long as I satisfy a legitimate bill, I am not doing anything that is illegal. If he wants to play with the books, that is his problem, not mine, him and IRS, not mine." "I'm not the police -- I am not watching out for everybody's conduct. I am just to make sure that P.T. & L. does it the right way."

The final witness at the hearing was John Kilpatrick, Chief, Bureau of Contract Administration of NJDOT. Kilpatrick stated that the construction division engineers would raise serious questions if Braen Construction company were listed by P.T. & L. as a bridge subcontractor because of Braen's lack of background or experience in bridge work, or if Braen's "sub-subbed" the bridge work to a third firm.

HEARING EXAMINER'S DETERMINATION AND RECOMMENDATION

From the evidence on both sides of this case there is an irreconcilable conflict as to what the situation in fact was. On one hand, we have an illegal "complimentary bid" arrangement memorialized by 33 notes totaling $185,000, bogus invoices for rental of equipment and materials, and the payment by checks of P.T. & L. in the amount of $150,000. On the other hand, we have a theory based upon Braen's agreement to be P.T. & L.'s bridge subcontractor followed by a settlement of a potential damage claim for breach by P.T. & L. of an oral commitment to subcontract the bridge work to Braen in return for Braen's bridge prices, again memorialized by the 33 notes, phony invoices and $150,000 in checks, which if believed, would constitute a lawful transaction.

The conflict I, as the hearing officer, will have to determine. I will have to determine where the truth lies between these parties. In determining the credibility of the various witnesses I have considered the reasonableness or unreasonableness and the possibility or improbability of their testimony. In view of all the relevant evidence, the inconsistencies of their testimony and the interest or lack of

interest of a witness in the outcome of the hearing and from all these circumstances I have determined that the weight or preponderance of the evidence demonstrates the lack of moral integrity on the part of P.T. & L. and Nicholas Laganella. *Compare Mal-Bros. Contracting Co. v. Kobl.* 113 N.J. Super. 144 (App. Div. 1971) certif. den. 58 N.J. 94 (1971). While I consider the entire transaction as set forth by P.T. & L. to be improbable, I especially find that P.T. & L.'s argument about the settlement of a potential damage claim without any of the usual and expected indicia of a true settlement, i.e., a release, convenant not to sue or some other writing evincing the settlement, together with P.T. & L.'s admitted participation in the bogus rental scheme, runs so counter to normal business practice as to be totally unrealistic.

Contrarywise, the version of the events explained by Evans seems to me to be reasonably probable. Parenthetically, the testimony of LeTourneau and the Grand Jury minutes of Braen, Jr., which were offered by P.T. & L. at the hearing, corroborate the existence of the complementary bid arrangement. Laganella's testimony about receiving the bridge prices from Evans is not materially inconsistent with Evans' explanation that he would have no misgivings about transmitting those prices to Laganella once the agreement to

place a collusive bid was made. Evans stated:

> "From looking at this bid book and seeing the markouts of every item, and my writing above them, I would have to assume that I gave him these bid figures the night prior to the bid. In other words, when he called me back there 9, 10 o'clock the night prior to the bid to go over the figures to give to me to be sure that we were higher than he, if at that time he told me that he needed bridge prices, I would have certainly given them to him, because once I made an agreement, once we had committed ourselves to give a complimentary bid to them, then it was up to me whether I give him the bid or not. In other words, we were giving him our subcontract bridge price, and it appears from here on the basis of this, that is assuming what I did."

Laganella's claim that he received the bridge prices on the prebid worksheet two or three days before the opening of the bids as opposed to the night before does not significantly weaken Evans' testimony. Braen's chief estimator, LeTourneau, who acquired Diversified's bridge prices, testified that he did not obtain the prices until the day before the bid opening.

Additionally, it is clear from the evidence that the Braen organization had no prior background as a bridge subcontractor and had always subcontracted out its bridge work - a fact that was well known to Laganella. John Kilpatrick

testified that the NJDOT would have raised serious questions if Braen were selected as P.T. & L.'s bridge subcontractor because of Braen's lack of experience, or if Braen's acted as a middleman and "sub-subbed" the bridge work to a third party such as Diversified. Laganella's explanation for not questioning Braen's lack of experience in this specialized area was that:

> "...The Braen Company has been in business much longer than I have and Sam Braen could buy and sell me. So, who am I to question Sam Braen. I accept them as a qualified contractor."

In view of Laganella's knowledge that Braen did not do bridge work, this explanation was unsatisfactory. Furthermore, assuming Braen Construction Company intended to "sub-sub" the bridge work to Diversified, it is reasonable to expect that Evans would have notified Laganella of this fact so that Diversified could have participated in the several discussions about the division of responsibilities on the project. Instead, Laganella's testimony about the several conferences with Evans prior to bidding calls for the untenable conclusion that the Braen Construction Company would actually do the bridge work itself.

The fact that the Braen Construction Company actu-

ally placed a bid on the Route 23 contract as a general contractor was not explained by Laganella to my satisfaction. Laganella urged that it is quite common for a contractor to bid competitively as a prime contractor, while at the same time agreeing to be a subcontractor in the event it was not the low bidder. In support of his "bridge subcontracting" theory of the case, Laganella cited the fact that Braen, Sr. and Braen, Jr., did not especially desire to be the prime contractor on the Route 23 job. But why then did the Braens submit a bid on the contract as a general contractor? In order that I conclude that no criminal conspiracy occurred, I would have to find that Braen submitted a competitive bid on the Route 23 project. Such a conclusion is incompatible with Laganella's testimony about his numerous discussions with Evans about the division of responsibilities on the project. It is also inconsistent with normal and prudent business practices. Thus, it appears that the several discussions between Braen and Laganella related to an agreement that Braen Construction Company not bid competitively rather than an agreement about the division of responsibilities on the project if P.T.&L. were the low bidder.

Finally, P.T.&L. urges that the fact that it reduced its bid by $59,000 on the morning of the bid opening demon-

strates that no conspiracy took place. I interpret this bid reduction as simply manifesting that P.T.&L. wanted the Route 23 contract very badly and accordingly took great pains to insure that its bid did not significantly vary from the NJDOT engineer's estimate. Laganella testified that he thought that his asphalt prices were too high; therefore, the $59,000 reduction can be construed as reflecting extra caution.

In evaluating conflicting positions, I find that the most significant weakness in P.T.&L.'s explanation is its utter lack of conformity with normal and reasonable business practices. In short, P.T.&L.'s testimony about the settlement of a speculative damage claim by Braen was wholly unconvincing.

In conclusion, I believe that a continuation of the suspension of P.T.&L. on the ground of lack of moral integrity is warranted. I make no recommendation as to the term of the debarment other than to note that N.J.S.A. 2A: 98-4 setting forth a 5-year period, although not binding on the Commissioner, might be used as a guide line for a maximum period. Of course, P.T.&L. is entitled to present any mitigating circumstances which might mandate a shorter period.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

C.A. No. 88-1379

HENRY LEE JACKSON et al. v. THE HANOVER INSURANCE COMPANIES

OPINION GRANTING SUMMARY JUDGMENT

MAY 16, 1988

ANNE E. THOMPSON, DISTRICT JUDGE

THE COURT: This matter comes before the court on defendant Hanover Insurance Co.'s motion for summary judgment and a motion by plaintiffs Harry Lee Jackson and Debra Jackson for leave to amend the complaint. Plaintiffs' complaint was originally filed on February 18, 1988 in Superior Court, Monmouth County alleging malicious prosecution and failure to act properly within the scope of the Unfair Claims Settlement Practices Act, N.J.S.A. 17B:30-1. Defendant removed the case to federal court on March 18, 1988.

The court will first address defendant's motion for summary judgment. The defendant alleges that the first count of the complaint should be dismissed because it fails to set forth a factual basis for an allegation of malicious prosecution and the second count should be dismissed because there is no private right of action under the Unfair Claims Settlement Practices Act. The plaintiffs concede that the second count fails to state a cause of action because the Unfair Claims Settlement Practices Act does not create a private right of action. (Plaintiffs' Brief, p. 5.). Thus the only remaining issue for summary judgment is whether plaintiffs have stated a claim for malicious prosecution.

Plaintiffs allege that Hanover acted maliciously in

commencing and instituting a criminal prosecution of the plaintiffs for arson, conspiracy and attempted theft by deception and that this criminal action was commenced without basis. Defendant argues that in order to state a claim for malicious prosecution plaintiffs must show: (1) that a criminal proceeding has been instituted or continued by the defendant against the plaintiff; (2) that the criminal proceeding was terminated in favor of the accused; (3) that there was no probable cause for the charge; and (4) that there was malice or a primary purpose other than bringing the offender to justice. *Voytko v. Ramada Inn of Atlantic City*, 445 F. Supp. 322 (D.N.J. 1978). Defendant maintains that plaintiffs have not shown that Hanover instituted or continued the criminal proceedings against plaintiffs. Hanover did not file any criminal charges against plaintiffs. This matter was brought before the grand jury by the county prosecutor's office. Hanover's only role was that Hanover representatives were subpoenaed to testify before the grand jury. Hanover argues that it was the prosecutor's decision to take the evidence to the grand jury and the grand jury's decision to indict the plaintiffs. Hanover employees merely responded to the subpoena served upon them.

In *Whittaker v. Duke*, 473 F.Supp. 908, 910 (S.D.N.Y.

1979, the court held that under New Jersey law "[o]ne who merely responds to requests for information or who testifies as a witness does not by those acts, institute or continue a prosecution." The court further notes that if the defendant "merely states what he believes leaving the decision to prosecute entirely to the uncontrolled discretion of the officer" he cannot be found liable for instituting or continuing the prosecution. *Id.* (quoting Prosser, Law of Torts 836-74 (4th Ed. 1971)). A person can, however, be found liable for "institution or continuation" of a prosecution "if it is found that his persuasion was the determining factor in inducing the officer's decision or that he gave information which he knew to be false and so unduly influenced the authorities..." *Id.* (quoting Prosser at 836-7).

Defendant Hanover maintains that not only are they not liable for instituting the prosecution but in addition plaintiffs have not shown that there was an absence of probable cause for the criminal action. The prosecutor found probable cause to submit the evidence to the grand jury and the grand jury found probable cause to issue an indictment. Following the presentation of the evidence the court found sufficient probable cause to have the jury deliberate as to the theft by deception charge.

Plaintiffs maintain that Hanover's investigator John Ford was responsible for persuading the Long Branch Police Dept. to reopen its investigation and for persuading the Monmouth County Prosecutor's Office to present the case to the grand jury. Plaintiffs have not produced any evidence that defendant or its representatives were responsible for the reopening of the case. All plaintiffs have shown is that the defendant provided the police with the evidence it uncovered in its investigation. (Plaintiffs' Exhibit A). The decision to reopen the investigation was entirely at the discretion of the police department. Furthermore, plaintiffs have not shown that defendant was responsible for the prosecutor' decision to present the case to the grand jury. The only evidence they have produced is that Hanover's investigator attended a meeting with a member of the prosecutor' office at which arson cases were discussed including the Jackson case. The investigator was then called by the prosecutor's office and told the office was going to subpoena the Jackson file. After reviewing the file the prosecutor' office decided to open an investigation. Apparently at the request of the prosecutor's office, Mr. Ford met with the prosecutor's investigator Mike Morotta several times. Mr. Morotta appears to have conducted an extensive investigation of his own.

(Plaintiffs' Exhibit G). Finally it was Morotta, the investigator for the prosecutor's office, not anyone representing Hanover, who testified before the grand jury that Mr. Jackson worked with the chemical Taluene and indicated that Taluene was "not a common or readily available substance." (Plaintiffs' Exhibit I. p. 35).

All that the plaintiffs have shown is that the defendant notified the police and the prosecutor of it investigation as it is required to do by N.J.S.A. 17:36-16. The prosecutor's office then conducted its own investigation and decided to present the evidence to the grand jury. The plaintiffs have various complaints as to information not given to the grand jury in general and by defendant's representative specifically. The defendant is not, however, responsible for the way the presentation to the grand jury was made by the prosecutor's office. Furthermore, as the court in *Whittaker* notes even if the defendant' representative had perjured himself before the grand jury he would not be liable for instituting or continuing the prosecution. *Whittaker*, 473 F.Supp. at 910.

The court must conclude that defendant is entitled to summary judgment on plaintiffs' claims for malicious prosecution. Plaintiffs have not shown that defendant instituted or continued the criminal prosecution against them nor have

they shown that the defendant was the determining factor in the decision to prosecute them. Finally, the evidence against them which plaintiffs most object to, regarding the chemical taluene was presented to the grand jury not by defendant's representatives but by the prosecutor's investigator.

Since the court has granted the defendant's motion for summary judgment, the plaintiffs' motion to amend is moot. The plaintiffs were moving to add the defendant's representatives/investigators whose actions are discussed above. The court notes that summary judgment would have been granted on such claims for the same reasons that summary judgment was granted for defendant Hanover.

BANKRUPTCY CODE, Section 523

11 United States Code § 523

§523. Exceptions to discharge.

(a) A discharge under section 727,1141,1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required—

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open

end credit plan obtained by the individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable: "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent debtor; an extension of consumer credit under an open end credit plan is to be defined for the purposes of this subparagraph as it is defined in the Consumer Credit Protection Act (15 U.S.C. 1601 et seq.);

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of both spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402 (a)(26) of the Social Security Act or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary

loss, other than a tax penalty—

(A) relating to tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition; or

(8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless—

(A) such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) to any entity, to the extent that such debt arises from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States

or its territories wherein such motor vehicle was operated and within which such liability was incurred; or

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge or was denied a discharge under section 727(a)(2),(3),(4),(5),(6) or (7) of this title, or under section 14c (1),(2),(3),(4),(6), or (7) of such Act.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965 (20 U.S.C. § 1087-3), or under section 733(g) of the Public Health Service Act (42 U.S.C. § 294f) in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.